[fol. 282]

Employment Statistics

	All Firms	Comp.	Florida
Total Employees	50.3	49.7	40.3
Sales Employees	19.8	19.4	14.4
Shipping & Delivery Employees	9.6	9.2	10.1
Warehouse & Occupancy Employees	7.2	7.7	5.0
General & Administrative Employees	13.7	13.4	10.8
Sales Per Employee ($ 000)	134.7	141.3	174.0
Sales Per Sales Employee ($ 000)	341.3	365.2	487.0
Sales Per Shipping and Delivery Employee ($ 000)	708.7	774.9	694.4
Sales Per Warehouse and Occupancy Employee ($ 000)	943.6	915.4	1402.7
Sales Per General & Administrative Employee ($ 000)	494.8	519.9	649.4

[fol. 283]

Annual Survey of Operations

1963

Illinois - Chicago ~ p. 5

Prepared by

the

School of Commerce and Finance

Saint Louis University

for

Wine and Spirits Wholesalers of America, Inc.

[fol. 284]

This report is based on 10 questionnaires representing 13 establishments. The comparisons are based on all firms reporting in 1963 and on the average firms of the same sales volume classifications as those reporting from your state.

[fol. 285]

Balance Sheet Comparisons

	1961		1962	
	All Firms	Ill. (Chi.)	All Firms	Ill. (Chi.)
Cash	5.48	6.08	5.83	4.64
Receivables - Net	29.66	29.37	30.38	35.13
Inventories	46.16	45.97	47.78	49.23
Warehouse Receipts	4.06	7.80	3.86	1.88
Other Current Assets	3.88	1.64	1.67	1.39
Total Current Assets	89.24	90.86	89.52	92.27
Investments	4.04	3.17	3.83	1.72
Funds	.22	.41	.20	.28
Fixed Assets - Net	5.18	5.11	5.38	5.27
Intangibles	.46	.13	.19	.14
Deferred Items	.86	.32	.88	.32
Total Assets	100.00	100.00	100.00	100.00
Current Liabilities	56.66	64.78	55.04	59.38
Fixed Liabilities	5.46	6.36	5.13	5.87
Deferred Income	.08	-	.14	-
Reserves	.34	.22	.43	.34
Total Liabilities	62.54	71.36	60.74	65.59
Net Worth	37.46	28.64	39.26	34.41
Total Liabilities and Net Worth	100.00	100.00	100.00	100.00

	1963			
	All Firms Reporting	Range of Experience	Ill. (Chi.)	Range of Experience
Cash	5.89	.04 - 38.04	5.62	.32 - 10.14
Receivables - Net	30.60	.00 - 64.85	34.24	31.26 - 41.05
Inventories	46.54	7.01 - 89.36	45.89	35.05 - 57.60
Warehouse Receipts	4.36	.00 - 66.76	5.93	.00 - 23.08
Other Current Assets	1.64	.00 - 45.63	1.60	.00 - 3.20
Total Current Assets	89.03	34.02 - 99.82	93.28	85.46 - 98.46
Investments	3.55	.00 - 65.52	1.57	.00 - 6.24
Funds	.13	.00 - 8.01	.57	.00 - 6.0[illegible]
Fixed Assets - Net	5.79	.00 - 34.51	4.31	.00 - [illegible]
Intangibles	.26	.00 - 8.40	.08	.00 - [illegible]
Deferred Items	1.24	.00 - 22.98	.19	.00 - 1.69
Total Assets	100.00		100.00	
Current Liabilities	56.07	5.11 -103.08	65.43	38.63 - 89.23
Fixed Liabilities	6.23	.00 - 87.67	2.65	.00 - 9.37
Deferred Income	.18	.00 - 10.18	.00	.00 - .01
Reserves	.24	.00 - 9.05	.40	.00 - 3.99
Total Liabilities	62.72	5.11 -158.80	68.48	42.62 - 94.09
Net Worth	37.28	(58.80)- 99.13	31.52	5.91 - 57.38
Total Liabilities and Capital	100.00		100.00	

[fol. 286]

Selected Ratios

	1961			1962		
	All Firms	Comp.	Ill. (Chi.)	All Firms	Comp.	Ill. (Chi.)
Current Ratio	1.58	1.51	1.40	1.63	1.50	1.55
Annual Rate of Stock Turnover	6.36	6.24	7.33	6.57	6.57	7.77
Closing Inventory as a Per Cent of Beginning Inventory	102.28	100.16	111.30	103.63	106.04	95.88

	1963			
	All Firms	Range of Experience	Comp.	Ill. (Chi.)	Range of Experience
Current Ratio	1.59	.67 - 110.48	1.55	1.43	1.00 - 2.45
Annual Rate of Stock Turnover	6.66	2.33 - 16.14	6.62	7.84	4.24 - 10.98
Closing Inventory as a Per Cent of Beginning Inventory	100.52	45.03 - 343.00	101.57	106.69	96.92 -147.49
Return on Net Worth	12.28	(2587.11)- 177.02	11.90	14.97	(19.22)- 98.32
Return on Total Assets	4.58	(16.32)- 54.14	3.79	4.72	(3.03)- 8.30

[fol. 287]

Income Statement Comparisons

	1961			1962		
	All Firms	Comp	Ill. (Chi.)	All Firms	Comp	Ill. (Chi.)
Net Sales	100.00	100.00	100.00	100.00	100.00	100.00
Cost of Goods Sold	88.78	89.01	90.14	88.75	88.96	90.22
Gross Profit	11.22	10.99	9.86	11.25	11.04	9.78
Operating Expenses	9.91	9.88	8.84	9.81	9.78	8.73
Net Operating Profit	1.31	1.11	1.02	1.44	1.26	1.05

	1963				
	All Firms	Range of Experience	Comp.	Ill. (Chi.)	Range of Experience
Net Sales	100.00		100.00	100.00	
Cost of Goods Sold	88.77	68.63 - 96.80	88.94	90.18	88.96 - 92.31
Gross Profit	11.23	3.20 - 31.37	11.06	9.82	7.69 - 11.04
Total Operating Expenses	9.94	1.77 - 33.45	9.87	8.71	6.48 - 10.72
Net Operating Profit (before Income Taxes)	1.29	(5.43)- 7.68	1.19	1.11	(1.28)- 2.03

[fol. 288]

Operating Expense Comparisons

	1961			1962		
	All Firms	Comp.	Ill. (Chi.)	All Firms	Comp.	Ill. (Chi.)
Total Expenses	9.910	9.883	8.840	9.808	9.777	8.729
Administrative	2.937	2.842	2.284	2.800	2.632	2.089
Selling	4.000	4.166	4.060	4.011	4.314	4.095
Shipping	1.287	1.266	.996	1.359	1.232	1.011
Warehouse	.651	.643	.777	.639	.622	.692
Occupancy	.461	.422	.387	.481	.447	.497
Other	.574	.544	.336	.518	.530	.345

	1963				
	All Firms	Range of Experience	Comp	Ill. (Chi.)	Range of Experience
Total Operating Expenses	9.942	1.767 - 33.454	9.869	8.713	6.479 - 10.717
Administrative	2.869	1.212 - 13.148	2.773	2.079	1.282 - 3.052
Selling	3.914	.109 - 14.642	4.025	4.024	2.769 - 5.435
Shipping	1.374	.000 - 5.690	1.326	1.029	.781 - 1.265
Occupancy	.521	.033 - 2.787	.491	.515	.264 - .998
Warehouse	.699	.000 - 2.356	.687	.692	.406 - 1.134
Other	.565	(.438)- 2.232	.567	.374	.052 - .792

[fol. 289]

Operating Expenses (Detailed)

	1961		1962		1963	
	All Firms	Ill. (Chi.)	All Firms	Ill. (Chi.)	All Firms	Ill. (Chi.)
Administrative Expenses	**2.937**	**2.284**	**2.800**	**2.069**	**2.869**	**2.079**
Executive Salaries	.713	.338	.683	.373	.662	.292
Executive Travel	.081	.029	.084	.024	.082	.038
Office Salaries	.862	.765	.805	.632	.867	.661
Office Supplies	.113	.096	.110	.091	.111	.075
Office Equipment	.125	.162	.119	.189	.120	.187
Business Licenses	.062	.005	.064	.005	.063	.008
Postage	.027	.026	.027	.024	.028	.026
Telephone & Telgrph.	.120	.101	.121	.106	.122	.093
Assoc. Dues & Subscriptns.	.075	.029	.073	.026	.070	.028
Gen'l. Insurance, Bonding	.160	.144	.147	.115	.146	.121
Contributions	.044	.034	.043	.024	.040	.022
Legal and Auditing	.091	.106	.084	.103	.088	.110
Other	.464	.449	.440	.377	.470	.368
Selling Expenses	**4.000**	**4.060**	**4.011**	**4.095**	**3.914**	**4.024**
Managers & Supervisors	.586	.446	.579	.445	.547	.467
Salesmen's Salaries	2.638	2.979	2.634	2.957	2.602	2.871
Salesmen's Travel Exp.	.254	.004	.265	.032	.252	.039
Advertising & Promotion	.370	.509	.389	.461	.350	.426
Other	.152	.122	.144	.200	.163	.221
Shipping Expenses	**1.287**	**.996**	**1.359**	**1.011**	**1.374**	**1.029**
Salaries & Wages	.799	.708	.803	.743	.831	.728
Common & Contract Delivry	.128	.048	.185	.074	.166	.001
Rental of Equipment	.035	.125	.081	.091	.103	.155
Oper. & Maint. of Equipmt.	.164	.069	.175	.064	.161	.077
Depreciation of Equipment	.070	.018	.070	.010	.067	.019
Other	.041	.028	.045	.029	.046	.049

[fol. 290]

Operating Expenses (Detailed)

	1961		1962		1963	
	All Firms	Ill. (Chi.)	All Firms	Ill. (Chi.)	All Firms	Ill. (Chi.)
Occupancy Expenses	.461	.387	.481	.497	.521	.515
Salaries & Wages	.021	.020	.016	.019	.018	.030
Real Estate Taxes	.040	.050	.035	.059	.043	.073
Depreciation on Bldgs.	.051	.063	.051	.075	.058	.066
Rent	.204	.123	.231	.167	.243	.164
Insurance on Buildings	.016	.001	.016	.017	.019	.017
Light, Heat & Power	.050	.057	.053	.067	.057	.066
Repairs & Maintenance	.041	.044	.038	.052	.041	.051
Outside Storage	.017	-	.022	.013	.017	.003
Other	.021	.029	.019	.028	.025	.045
Warehouse Operation Expense	.651	.777	.639	.692	.699	.692
Salaries & Wages	.562	.644	.549	.625	.595	.593
Supplies and Equipment	.035	.039	.046	.029	.043	.021
Other	.054	.094	.044	.033	.061	.078
Other Expenses	.574	.336	.518	.345	.565	.374
Interest Paid	.270	.183	.237	.184	.260	.167
Loss From Bad Debts	.107	.104	.107	.134	.126	.161
Personal Property Taxes	.096	.018	.082	.010	.083	.013
Other	.101	.031	.092	.017	.096	.033

[fol. 291]

Sales, Profits and Expenses Per Invoice

(Based on returns from 8 firms in your State)

	$ Per Invoice		
	All Firms	Comp.	Ill. (Chi.)
Net Sales	116.27	131.29	126.15
Gross Profit	13.16	14.39	12.31
Total Expenses	11.64	12.93	10.80
Net Profit	1.52	1.46	1.51
Selling Expenses	4.57	5.35	4.93
Salesmen's Salaries	3.06	3.64	3.57
Salesmen's Travel Expense	.26	.21	.05
Shipping & Delivery Expense	1.63	1.66	1.30
Occupancy Expense	.63	.66	.66
Warehousing Expense	1.83	.96	.88
Warehousing Salaries	.69	.80	.74
Administrative Expense	3.25	3.42	2.52
Office Salaries	1.06	1.28	.85
Other Expenses	.73	.88	.51

[fol. 292]

Employment Statistics

	All Firms	Comp.	Ill. (Chi.)
Total Employees	50.3	140.6	144.9
Sales Employees	19.8	58.9	61.3
Shipping & Delivery Employees	9.6	26.9	26.4
Warehouse & Occupancy Employees	7.2	21.3	25.4
General & Administrative Employees	13.7	41.5	31.8
Sales Per Employee ($ 000)	134.7	139.5	139.5
Sales Per Sales Employee ($ 000)	341.3	355.8	329.6
Sales Per Shipping and Delivery Employee ($ 000)	708.7	764.4	764.5
Sales Per Warehouse and Occupancy Employee ($ 000)	943.6	975.1	797.9
Sales Per General & Administrative Employee ($ 000)	494.8	502.2	636.2

[fol. 293]

Annual Survey of Operations

1963

Missouri — p. 4

Prepared by

the

School of Commerce and Finance

Saint Louis University

for

Wine and Spirits Wholesalers of America, Inc.

[fol. 294]

This report is based on 16 questionnaires representing 18 establishments. The comparisons are based on all firms reporting in 1963 and on the average firms of the same sales volume classifications as those reporting from your state.

[fol. 295]

Selected Ratios

	1963				
	All Firms	Range of Experience	Comp.	Mo.	Range of Experience
Current Ratio	1.59	.67 - 110.48	1.95	1.59	1.05 - 9.37
Annual Rate of Stock Turnover	6.66	2.33 - 16.14	6.12	5.67	3.10 - 11.30
Closing Inv. as Per Cent of Beg. Inventory	100.52	45.03 - 343.00	99.50	105.59	64.64 - 157.80
Return on Net Worth	12.28	(2587.11)- 177.02	9.48	8.64	(1.20)- 28.66
Return on Total Assets	4.58	(16.32)- 54.14	4.27	3.42	(1.10)- 12.27

Income Statement Comparisons

	1963				
	All Firms	Range of Experience	Comp.	Mo.	Range of Experience
Net Sales	100.00		100.00	100.00	
Cost of Goods Sold	88.77	68.63 - 96.80	88.21	89.26	85.64 - 91.74
Gross Profit	11.23	3.20 - 31.37	11.79	10.74	8.26 - 14.36
Operating Exp.	9.94	1.77 - 33.45	10.54	9.63	6.91 - 13.61
Net Operating Profit	1.29	(5.43)- 7.68	1.25	1.11	(.55)- 4.18

[fol. 296]

Operating Expense Comparisons

	1963				
	All Firms	Range of Experience	Comp	Mo.	Range of Experience
Total Operating Expenses	9.942	1.767 - 33.454	10.454	9.625	6.910 - 13.613
Administrative	2.869	1.212 - 13.148	3.373	3.170	2.329 - 6.162
Selling	3.914	.109 - 14.642	3.773	3.453	2.133 - 4.349
Shipping	1.374	.000-- 5.690	1.571	1.232	.587 - 4.821
Occupancy	.521	.033 - 2.787	.586	.556	.239 - 1.533
Warehouse	.699	.000 - 2.356	.641	.630	.000 - 1.464
Other (including Bad Debts)	.565	(.438)- 2.232	.510	.584	.043 - 1.618

[fol. 297]

Operating Expenses (Detailed)

	1963 All Firms	1963 Mo.
Administrative Expenses	**2.869**	**3.170**
Executive Salaries	.662	1.110
Executive Travel	.082	.105
Office Salaries	.867	.837
Office Supplies	.111	.034
Office Equipment	.120	.120
Business Licenses	.063	.083
Postage	.028	.024
Telephone & Telegraph	.122	.100
Assoc.Dues&Subscriptns.	.070	.083
Gen'l. Insurance,Bonding	.146	.143
Contributions	.040	.030
Legal and Auditing	.088	.101
Other	.470	.345
Selling Expenses	**3.914**	**3.453**
Managers & Supervisors	.547	.324
Salesmen's Salaries	2.602	2.213
Salesmen's Travel Exp.	.252	.642
Advertising & Promotion	.350	.186
Other	.163	.088
Shipping Expenses	**1.374**	**1.232**
Salaries & Wages	.831	.665
Common & Contract Delvry	.166	.080
Rental of Equipment	.103	.227
Oper.&Maint.of Equipmt.	.161	.151
Depreciation of Equipmt.	.067	.078
Other	.046	.031

	1963 All Firms	1963 Mo.
Occupancy Expenses	**.521**	**.556**
Salaries & Wages	.018	.020
Real Estate Taxes	.043	.073
Depreciation on Bldgs.	.058	.059
Rent	.243	.283
Insurance on Buildings	.019	.007
Light, Heat & Power	.057	.064
Repairs & Maintenance	.041	.037
Outside Storage	.017	.009
Other	.025	.004
Warehouse Operation Expense	**.699**	**.630**
Salaries & Wages	.595	.561
Supplies & Equipment	.043	.037
Other	.061	.032
Other Expenses	**.565**	**.584**
Interest Paid	.260	.133
Loss From Bad Debts	.126	.127
Personal Propty.Taxes	.083	.045
Other	.096	.279

[fol. 298]

Sales, Profits and Expenses Per Invoice

(Based on returns from 12 firms in your State)

	$ Per Invoice		
	All Firms	Comp.	Mo.
Net Sales	116.27	99.08	105.03
Gross Profit	13.16	11.47	11.13
Total Expenses	11.64	10.22	10.04
Net Profit	1.52	1.25	1.09
Selling Expenses	4.57	3.68	3.64
Salesmen's Salaries	3.06	2.25	2.28
Salesmen's Travel Expense	.26	.36	.70
Shipping & Delivery Expense	1.63	1.57	1.12
Occupancy Expense	.63	.59	.63
Warehousing Expense	.83	.63	.75
Warehousing Salaries	.69	.54	.65
Administrative Expense	3.25	3.21	3.16
Office Salaries	1.06	.93	.92
Other Expenses	.73	.54	.74

[fol. 299]

Employment Statistics

	All Firms	Comp	Mo.
Total Employees	50.3	27.9	26.5
Sales Employees	19.8	10.6	11.4
Shipping & Delivery Employees	9.6	5.3	3.3
Warehouse & Occupancy Employees	7.2	4.3	3.7
General & Administrative Employees	13.7	7.7	8.1
Sales Per Employee ($ 000)	134.7	115.7	136.8
Sales Per Sales Employee ($ 000)	341.3	308.0	319.0
Sales Per Shipping and Delivery Employee ($ 000)	708.7	599.6	1097.8
Sales Per Warehouse and Occupancy Employee ($ 000)	943.6	762.2	983.5
Sales Per General & Administrative Employee ($ 000)	494.8	419.5	445.3

[fol. 300]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

AFFIDAVIT OF JACK GOODMAN IN SUPPORT OF MOTION

State of New York,
County of Albany, ss.:

Jack Goodman, being duly sworn, deposes and says:

1. I am an attorney-at-law with offices at No. 100 State Street, Albany, New York.

2. I am, and have for the past nine years been, counsel to the New York State Wholesale Liquor Association, Inc. The New York State Wholesale Liquor Association, Inc., is a trade association, the members of which consist of most of the liquor and wine wholesalers doing business in the so-called "upstate" area of New York—to wit, the entire state excluding Metropolitan New York, Long Island, and Westchester County.

3. As counsel for the past nine years to this Association, I am acquainted with the operations of these member wholesale businesses.

4. These liquor and wine wholesale businesses are independent operations. The stock in these wholesaler corporations is not owned by any supplier or brand owner. Nor do suppliers or brand owners control these independent wholesalers by interlocking director or officer arrangements.

5. The average wholesaler handles the brands of approximately fifteen (15) brand owners.

6. The number of brands or labels owned by a brand owner will vary. Some brand owners have as few as three or four brands; some brand owners have as many as one hundred brands.

7. The amount of business which any wholesaler will do in the brands of any one brand owner will vary considerably. If the brands of a particular supplier or brand owner

constitute the major line in the wholesaler's operation, the business done in the brands of such supplier or brand owner may constitute as much as 50% of the total business done [fol. 301] by such wholesaler. On the other hand, if the brands of a particular supplier do not constitute the major line in the wholesaler's operation, the business done in the brands of such supplier or brand owner may constitute as little as 1% of the total business done by such wholesaler.

8. Likewise, with respect to a particular brand of a brand owner, the amount of business which any wholesaler will do in a single brand will vary considerably. The business done in one brand may range as high as 20% of the total business done by such wholesaler; on the other hand, the business done in one brand may amount to as little as a fraction of 1% of the total business done by such wholesaler.

9. In view of the above circumstances and conditions pertaining to the operations of the liquor and wine wholesalers in the upstate New York area, I as counsel to the above designated Association am unable to advise the members thereof whether and to what extent they are or may be "related persons" as defined in Section 101-b, subdivision 3, paragraph (f), of the Alcoholic Beverage Control Law. For example, I am unable to advise what is the meaning of the term "principal or substantial business," in said paragraph. I am unable to advise whether a wholesaler is a "related person" for all of his business, or for only that portion of the business he does in the brands of one brand owner, or for only that portion of the business he does in one brand of one brand owner. Likewise, I am unable to advise the members of my association as to the meaning of the clause in said paragraph—to wit, "who has an exclusive franchise or contract to sell such brand or brands." The State Liquor Authority has ruled that a wholesaler must sell to retailers in all parts of the State, unless the wholesaler specifically designates the retailers to which he will limit distribution.

(Sworn to by Jack Goodman, October 15, 1964.)

[fol. 302]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

AFFIDAVIT OF JACK W. MARER IN SUPPORT OF MOTION

State of Nebraska,
County of Douglas, ss.:

Jack W. Marer, being first duly sworn, upon my oath, depose and say, that I am an Attorney at Law admitted to practice in all of the courts of the State of Nebraska, and in the United States District Court for Nebraska, and in the Eighth Circuit Court of Appeals since July 2, 1926, and that I have been actively so engaged ever since that date.

Since 1940 I have been General Counsel of the Nebraska Wholesale Liquor Distributors Association, an association composed of duly licensed wholesale distributors of alcoholic beverages in the State of Nebraska, and in such representation I have become familiar with the laws of the State of Nebraska regulating the manufacture, distribution and sale of alcoholic beverages and the general trade practice in the alcoholic beverage industry in the State of Nebraska.

Affiant further states there is no provision in the Nebraska Liquor Control Act or any rule or regulation of the Nebraska Liquor Control Commission now in effect which requires the filing or posting of prices or discounts from the manufacturer to the wholesaler, or from the wholesaler to the retailer, or from the retailer to the consuming public, and there is no official record or listing of any such prices.

Affiant further states that as a trade accommodation and on a strictly voluntary basis, the alcoholic liquor distributors who are members of this Association do publish their wholesale price list to retailers in a trade magazine known as the Nebraska Beverage Analyst, and that each of said distributors pays for its own individual listing, and

that such listed prices do not include so-called "deals" or quantity dicounts, and that each distributor promulgates its own deals or quantity discounts, based upon its own [fol. 303] individual judgment and discretion, and that such special programs vary from time to time and remain in effect for both short and long periods of duration, with the result that the actual net price of any alcoholic beverage will vary from time to time, based upon the nature, type and character of the so-called "deal" or quantity discount and the duration of the program.

That such types of deals or quantity discounts are permitted under Federal law and that a copy of two (2) Revenue Rulings are attached hereto and made a part hereof by reference; that there is no statute or ruling or regulation under the Nebraska Liquor Control Act which in any manner prohibits these types of arrangements.

These so-called "deals" and quantity discounts are in some degree based upon competition and other conditions existing within the trade area of the State of Nebraska at the time.

That the only manner known to this Affiant by which anyone could ascertain the current prevailing list price of any alcoholic beverage sold by any alcoholic liquor distributor to retailers in any particular month would be to physically examine the records of every wholesale liquor dealer, of which there are eight (8) in the City of Omaha, Nebraska, covering their sales to retail liquor dealers throughout the State of Nebraska, of which there are 1768, and that in the opinion of this Affiant it would take two persons approximately one month to make such physical examination of all of such invoices working under normal conditions.

Affiant further states that the books and records of alcoholic liquor distributors are not open to inspection by the general public but are only open to inspection by the Internal Revenue Service and the Nebraska Liquor Control Commission and that in the opinion of this Affiant such wholesale liquor dealers would not permit the inspection

[fol. 304] of their records by any persons for any purpose except by the persons duly authorized by law so to do.

Affiant further states that there does not presently exist any sub-jobbing in this state by duly licensed alcoholic liquor distributors.

Further Affiant sayeth not.

(Sworn to by Jack W. Marer, August 21, 1964.)

RULES, ATTACHED TO FOREGOING AFFIDAVIT

Rev. Rul. 54-161, C. B. 1954-1, 338.

Price reductions, rebates, refunds, and discounts given by a wholesale liquor dealer pursuant to an agreement made at the time of the sale of the merchandise involved are considered a part of the sales transaction, constituting reductions in price pursuant to the terms of the sale. Such transactions do not fall within the purview of Section 5(b) of The Federal Alcohol Administration Act, provided they do not involve the imposition of any requirement upon the retailer to take and dispose of a certain quota of the wholesale dealer's products, or do not involve any of the other practices set forth in section 5(a) to 5(d), inclusive, of the Act. This view would hold irrespective of whether the quantity discount was *prorated* and allowed on each delivery, given in a lump sum after the entire quantity of merchandise purchased had been delivered, or based on dollar volume or on the quantity of merchandise purchased.

Ordinarily "free" goods are nothing more than price reductions in the same status as discounts and, similarly, are not within the purview of Section 5(b) of The Federal Alcohol Administration Act. For example, if a wholesale liquor dealer agreed to "give" a retail liquor dealer a "free" [fol. 305] case for each ten purchased, such transaction is essentially a reduction in the usual price. However, if the amount of the product given free with the order is such that the pricing aspect is merely a *subterfuge*, the trans-

action would constitute a "gift" within the meaning of this section of The Federal Alcohol Administration Act.

Rev. Rul. 58-121, C. B. 1958-1, 609.

A wholesale liquor dealer may, without violation of section 5 of The Federal Alcohol Administration Act, offer to retail dealers combination "deals" composed of two or more kinds or brands of distilled spirits and/or wines at a special price at less than the combined list price of such items if sold separately, provided the retailer is given the option of purchasing the brands or kinds separately at the regular list price thereof and is without compulsion to purchase merchandise which he does not want. Such a transaction is held to be merely a quotation of price which is not within the purview of the trade practice provisions of the Act. For an example of the types of sales which constituted a violation, see, *Joseph F. Black* v. *Magnolia Liquor Company, Inc.*, 355 U. S. 24.

[fol. 306]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

AFFIDAVIT OF CHESTER F. MCNAMARA IN SUPPORT OF MOTION

State of Illinois,
County of Cook, ss.:

Chester F. McNamara, being first duly sworn on oath, deposes and says:

1. That he is an Attorney at Law, with offices at 188 W. Randolph Street, Chicago, Illinois; that he is the Executive Secretary and Counsel of the Illinois Wholesale Liquor Dealers Association, a trade association of wholesalers of alcoholic beverages in the State of Illinois, and has held this position since 1953; that he is thoroughly familiar with the laws of Illinois pertaining to this industry and also familiar with the trade practices of the industry.

2. That there is no law, rule or regulation in the State of Illinois which requires that prices of alcoholic beverages from supplier to wholesaler or from wholesaler to retailer be filed or posted.

3. That as a matter of trade accommodation, wholesalers list for the information of retailers in the Illinois Beverage Journal, a trade publication, prices representing suppliers' recommended suggested selling prices. There is no State law or agency rule or regulation requiring prices to be uniform to a class of purchasers. Discounts also vary, and there is no limitation on such discounts.

4. That there is some sub-jobbing of supplier's brands, sometimes to related firms.

5. That there is no statutory requirement in respect to the listing of prices from suppliers to wholesalers or any requirement that they be uniform or non-discriminatory.

6. That the only way to ascertain the lowest price and greatest discount or allowance on any brand sold by whole-
[fol. 307] salers to retailers in this State in any given month is by the physical inspection of all the invoices of all the wholesalers in this State who sell such brand. Based on your Affiant's experience in the trade, no wholesaler would permit such inspection, unless it is required by Illinois Law, and then only would it be available to State officials. Even if allowed, due to the very large number of invoices involved, it would take considerable time, probably fifteen (15) days or more to so ascertain such lowest price or discount on any item.

(Sworn to by Chester F. McNamara, August 21, 1964.)

IN THE SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

AFFIDAVIT OF CHARLES W. SAND IN SUPPORT OF MOTION

State of Wisconsin
County of Milwaukee

Charles W. Sand, being duly sworn, deposes and says:

I am an Attorney at Law with offices at 110 East Wisconsin Avenue, Milwaukee, Wisconsin. I am and for the past ten years have been the Executive Vice President and Counsel of the Wisconsin Wine and Spirits Institute, a trade association of wholesalers in this state. I am thoroughly familiar with the laws, rules, regulations, and trade practices affecting the industry in this state.

In the state of Wisconsin we have no requirements for price filing and no requirement for a mandatory minimum markup. Prices from wholesaler to retailer may change from day to day and from customer to customer; they also differ with respect to the trading area of the retailer.

[fol. 308] A small minority of wholesalers, on a voluntary basis, advertise their prices in the Wisconsin Beverage Journal, a trade publication. Such advertising or listed prices are the "suggested" prices to retailers but not necessarily the prices at which sales are made nor do they reflect any deals or discounts.

The actual prices from wholesaler to retailer differ to meet competition or other trade conditions.

Other than a few brands, most items are handled by two or more wholesalers so that there is competition on the same item or brand.

There are some 90 odd wholesalers in the state and over 14,000 retailers.

In order to ascertain the lowest price in any given month for any given item covering sales from wholesalers to retailers, it would be necessary to check the books and invoices of the wholesalers handling that item. Based upon my experience, wholesalers would not permit

such inspection unless mandatorily required by state or Federal law. Even if so permitted, such inspection would take a considerable length of time by virtue of the large number of wholesalers and retailers and the large numbers of transactions in any given month.

(Sworn to by Charles W. Sand, August 25, 1964.)

[fol. 309]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

AFFIDAVIT OF WILLIAM STEINBERG IN SUPPORT OF MOTION

State of Florida,
County of Hillsboro,

William Steinberg, being duly sworn, deposes and says:

I am the Executive Director of the Wholesale Liquor Dealers of Tampa, a trade association of wholesalers of alcoholic beverages, with offices at 5102 Longfellow Avenue, Tampa, Florida, and have occupied this position for the past nine years. Prior to that and for five years, I owned a company wholesaling and rectifying alcoholic beverages in the State of Florida. I am thoroughly familiar with the laws and trade practices affecting the industry in this State.

There is no state law or agency rule or regulation requiring the filing or posting of prices or discounts from supplier to wholesaler or from wholesaler to retailer, and no official record of such prices.

As a trade accommodation, most wholesalers publish their prices in trade journals such as the Southern Beverage Journal and the Florida Beverage Journal. Discounts are not published. Although prices to retailers are generally uniform, discounts are not, and vary from day to day, from retailer to retailer, depending on quantity (which also may not be uniform), on competition, on the importance of the retailer involved, etc. There is no state law or agency rule or regulation affecting discounts.

The only way to ascertain the lowest price or greatest discount on any brand sold by wholesalers to retailers in any month is to physically examine every invoice of every wholesaler selling such brand. From my experience, I know that wholesalers will not permit such examination of their records, unless by State officials pursuant to law or regulation.

(Sworn to by William Steinberg, May 25, 1964.)

[fol. 310]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

ANSWER

Defendants, by Louis J. Lefkowitz, Attorney General of the State of New York, answering the complaint herein:

I. Deny each and every allegation of paragraphs of the complaint numbered 53, 54, 56, 57, 58, 59, 60, 61, 63, 91, 94, 95, 96, 98, 107, 111, 113 and 114.

II. Admit the allegations contained in the paragraph of the complaint numbered 42, except deny the allegation that paragraph (f) of Section 9 of the new Act does not specify who is to file the affirmation; and for provisions of said paragraph (f) of Section 9 refer to the contents thereof.

III. Deny each and every allegation contained in the paragraph of the complaint numbered 52 and allege that prohibition of sales in New York for any brand of liquor for which an affirmation has not been filed is by provision of said paragraph effective during the period "covered by any such schedule" for which affirmation is required and has not been filed; and for the provisions of said paragraph (h) reference is made to the contents thereof.

IV. Admit the allegations contained in the paragraph of the complaint numbered 55 which describe the provi-

sions of §§2 and 101 (b-1) of the Alcoholic Beverage Control Law and Section 7 of Chapter 531 of the Laws of 1964, and deny each and every other allegation of said paragraph 55.

V. Deny each and every allegation contained in the paragraph of the complaint numbered 112 and allege that Rule 16, §65.69 of the Rules of the State Liquor Authority, [fol. 311] adopted pursuant to Section 101 (b) of the Alcoholic Beverage Control Law which became effective October 31, 1964, provides that "net bottle and case price paid by the seller" shall not apply "to any item where the manufacturer is the seller".

Wherefore, defendants demand judgment that the complaint herein be dismissed, together with the costs and disbursements of this action.

Louis J. Lefkowitz, Attorney General of the State of New York, Attorney for Defendants.

(Verified by Donald S. Hostetter, December 21, 1964.)

[fol. 312]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

Index No. 6127—64.

DEFENDANTS' NOTICE OF MOTION TO DISMISS MOTION FOR TEMPORARY INJUNCTION AND FOR A TEMPORARY RESTRAINING ORDER PENDING THE HEARING AND DETERMINATION OF THE MOTION FOR A TEMPORARY INJUNCTION—December 22, 1964

Please Take Notice that on the complaint and answer herein, and the affidavits of William E. Phillips and Ruth Kessler Toch, defendants will move this Court at a Special Term, Part I hereof, to be held in and for the County of Albany on December 28, 1964, at 10 A. M. on that day, or as soon thereafter as counsel can be heard, which is the

return date and place of the motion heretofore made herein by plaintiffs for an order restraining defendants from enforcing the provisions of §9 and of §7, subdivision 3(a) of Chapter 531 of the Laws of 1964, pending the determination of the issues in the action, for an order dismissing the complaint herein, or in the alternative, for judgment declaring §9 of Chapter 531 of New York Laws of 1964 and §7, subdivision 3 (2) of Chapter 531 of New York Laws of 1964 to be in all respects constitutional and valid, and for such other and further relief as to this Court shall seem just and proper, together with the costs of this action.

Dated: Albany, N. Y., December 22, 1964

Yours, etc.

Louis J. Lefkowitz, Attorney General of the State of New York, Attorney for Defendants, Office and Post Office Address, The Capitol, Albany, N. Y. 12224.

[fol. 313]

To:

Lord, Day & Lord, Esqs., Attorneys for Plaintiffs, 25 Broadway, New York, New York.

In the Supreme Court of the State of New York

County of Albany

Index No. 6127—64.

Affidavit of Ruth Kessler Toch in Support of Motion

State of New York,
County of Albany, ss.:

Ruth Kessler Toch, being duly sworn, deposes and says:

I am Assistant Solicitor General in the office of Attorney General Louis J. Lefkowitz, attorney for the defendants in the above action, have had charge of this action since its inception and am familiar therewith.

This affidavit is made in support of defendants' motion to dismiss the complaint herein, or in the alternative, for judgment declaring §9 of Chapter 531 of New York Laws of 1964 and §7, subdivision 3 (a) of said Chapter to be in all respects constitutional and valid; and in opposition to plaintiffs' application for a preliminary injunction restraining defendants from enforcing said statutory provisions pending the determination of the issues in this action. [fol. 314] For plaintiffs to sustain their right to the extreme, relief of staying the enforcement of the statutory provisions, their ultimate victory in the action must not be in doubt. This plaintiffs do not show.

As appears from the accompanying affidavit of William E. Phillips, Chief Executive Officer of the State Liquor Authority, the assertions of impossibility of performance in the complaint and in sundry affidavits submitted by plaintiffs are without substance, are conjectures, and do not constitute problems which are beyond being administratively resolved.

They do not in any case support the constitutional challenge which plaintiffs make to the statutory provisions they attack, as will more fully be set forth in memoranda of law which will be submitted to the Court by defendants.

Plaintiffs not having sustained their burden of showing a clear right to the drastic relief of preliminary injunction, it should be denied and the stay which was granted in the order to show cause should be vacated.

Plaintiffs not having stated facts sufficient to constitute a cause of action, the complaint should be dismissed, or in the alternative, judgment be granted defendants declaring §9 and §7, subdivision 3 (a) of Chapter 531 of New York Laws of 1964 to be in all respects constitutional and valid.

(Sworn to by Ruth Kessler Toch, December 22, 1964.)

[fol. 315]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

AFFIDAVIT OF WILLIAM E. PHILLIPS IN SUPPORT OF MOTION

State of New York,
County of Albany, ss.:

William E. Phillips, being duly sworn, deposes and says:

This affidavit is made in support of a motion to dismiss the complaint herein and in opposition to plaintiffs' application for a preliminary injunction restraining defendants from enforcing said statutory provisions pending the determination of the issues in this action.

I am Chief Executive Officer and Deputy Commissioner of the State Liquor Authority. I have been employed by the Authority more than 29 years. For approximately the past 10 years I have been Deputy Commissioner and adviser to the members of the Authority in respect to industry and community relations. In such capacity, as occasion arises, I confer with manufacturers and wholesalers in connection with their problems and conduct studies in order to assist in resolving such problems in a manner consistent with the intent of the Alcoholic Beverage Control Law and that will be equitable to the industry as a whole.

The instant amendment to the Alcoholic Beverage Control Law complained of in this action presents difficulties not too much different from those encountered in connection with prior amendments to such law which I have implemented and effectuated by drafting rules and procedures for adoption by the Authority. Most amendments to the Alcoholic Beverage Control Law have afforded to the Authority discretion in implementation consistent with [fol. 316] the purposes of the statute. And the instant amendment is no exception. Subdivision 4 of §101-b provides:

> "The liquor authority may make such rules as shall be appropriate to carry out the purpose of this section."

The Authority fully intends to administer the law within the scope of its discretion in such a manner as will be viable and practicable.

The difficulties complained of by the plaintiffs are largely conjectural and without basis in fact. It is not the intent of the law or the Authority to unduly burden or inhibit plaintiffs in their business or to subject them to prosecution unless the affirmations were to be recklessly false and submitted in bad faith. In any case of hardship occasioned by extraordinary circumstances, the Authority will in its discretion and upon application, as it has in the past and as plaintiffs are full well aware, for good cause shown and for reasons not inconsistent with the purpose of the statute, grant dispensation necessary to avoid undue and uncalled for hardship.

I direct my comments to allegations in the complaint and statements in affidavits which contend that compliance with the statute is impossible; that the language thereof is vague and indefinite to an extent which obviates the possibility of accuracy in affirmations called for, and that certain of their marketing practices militate against any precise determination as to actual prices.

I comment on these apart from whether there is legal substance to such contentions, which will be dealt with elsewhere.

In one of the affidavits submitted, it is conceded that sales in so-called control or monopoly States are 25¢ to $1 less than in other States. The inescapable assumption must therefore be that the price in other States is not only possible to ascertain, but is actually known to plaintiffs. [fol. 317] Affidavits submitted by the plaintiffs would make it appear that conformance with those parts of the statute requiring affirmations is impossible of compliance. They ignore the fact that in a number of other States, e. g., in the State of Pennsylvania, some of these same plaintiffs have been warranting for some time past that the price quoted to the Pennsylvania Liquor Control Board is "the lowest current price quoted to any other customer",

or "to any purchaser, dealer, agent or agency of any nature or kind anywhere in the United States of America". Certainly, what can be done in one jurisdiction should not be impossible in another or in New York.

Some of these affidavits also dwell at some length on the vagueness of the language of the statute. They protest unawareness of the meaning of the terms "allowances and inducements", notwithstanding the fact that these terms were incorporated in the Alcoholic Beverage Control Law of this State more than 20 years ago; that they have been doing business in this State throughout this period and that a number of administrative rulings and determinations have been made thereon by the Authority during this period, in some of which some of these plaintiffs were involved.

In the same vein they allege that because of discounts and allowances permitted in other States, it is impossible to arrive at a price at any given time. Again they reject their own experience. They ignore that as part and parcel of the offerings of their products in, for example, the State of Pennsylvania, they warrant that "if and when special cash or commodity, allowances, post-offs or discounts are offered to purchasers in any other State or the District of Columbia, the same" shall also be offered the Pennsylvania Liquor Control Board.

Similarly some of the plaintiffs express alleged confusion as to the term "related person". The statute provides a definition of the same. The long term practices of the Authority provide assurance that where uncertainty [fol. 318] arises in connection with a particular state of facts, the plaintiffs have access to the Authority for a ruling theron, such as has been made repeatedly in the past in other matters.

It is my experience that the relationship of distillers and other brand owners with other concerns which handle their brand products is such as to leave little doubt, with rare exceptions, as to whether such concerns fit the definition of "related persons". In connection with those ex-

ceptions, the Authority stands ready to assist them in resolving the same.

From my knowledge of the liquor control statutes of other States and my dealings with other State administrators, I am aware that in addition to the warranties imposed by the so-called control or monopoly States which have already been touched upon, a number of other States have price posting requirements or mandatory mark-up provisions incorporated in their Alcoholic Beverage Control Law which make the pricing structure in those States a matter of prime concern to distillers and other brand owners.

It follows therefore that distillers are aware of the prices for the most part for which their brands are sold by themselves, their subsidiaries, and other related persons. In advance posting of prices, as some of the plaintiffs are required to do in many of the States of the United States, they necessarily act on knowledge of their prices generally, and in the instance of sales to the control or monopoly States on current lowest prices.

With respect to the plaintiffs' contention that subdivision 3 (a) of the statute would operate to preclude sales in other States, Rule 16(65.1) of the Authority confines the application of this subdivision to purchasers for resale in this State and further provides that a brand owner may actually purchase and receive liquor in this State even though an appropriate price schedule is not in effect, provided such brand owner does not offer for sale or sell [fol. 319] such brand for resale in this State unless and until an appropriate schedule of prices is in effect. Moreover, with respect to purchases by wholesalers where sale or delivery is outside the State, it should be noted that §3, subdivision 35 of the Alcoholic Beverage Control Law defines wholesaler as "any person who sells at wholesale any beverage for the sale of which a license is required under the provisions of this chapter." This has historically been construed as applicable only to a person licensed as a

wholesaler under the Alcoholic Beverage Control Law of this State.

(Sworn to by William E. Phillips, December 22, 1964.)

IN THE SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

AFFIDAVIT OF JOHN F. O'CONNELL IN OPPOSITION TO DEFENDENTS' MOTION TO DISMISS COMPLAINT

State of New York,
County of New York, ss.:

John F. O'Connell, being duly sworn, deposes and says:

1. This affidavit is made in opposition to the motion to dismiss the complaint herein and in opposition to the defendants' request for judgment declaring Section 9 of Chapter 531 of the New York Laws, 1964 and Section 7, subdivision 3(a)-(b) of said Chapter to be in all respects constitutional and valid.

[fol. 320] 2. I am an attorney at law, duly admitted to practice in the Commonwealth of Massachusetts. I am President of National Association of Alcoholic Beverage Importers, Inc. I have held this post since June 15, 1964. Prior to my present position I was Chairman of the State Liquor Authority from 1943 to 1955. In such capacity I acquired a thorough knowledge of the rules and regulations and the policy of the Authority regarding enforcement of the Alcoholic Beverage Control Law. I have read and am familiar with the terms of Sections 7 and 9 of Chapter 531, Laws of 1964.

3. In an affidavit dated December 22, 1964 submitted in support of defendants' motion to dismiss the complaint herein, Mr. William E. Phillips, Deputy Commissioner of the State Liquor Authority, states that the deficiencies in Sections 7 and 9 of Chapter 531, which are set forth in the

complaint, can be remedied by rules to be adopted by the Authority. Aside from ignoring the well-known rule of law that unconstitutional laws cannot be remedied by administrative interpretation, this statement by Mr. Phillips also overlooks the fact that one reason for the 1964 amendments to the Alcoholic Beverage Control Law was, in the words of Governor Rockefeller, to remedy

> "The system which has developed under the law during the past thirty years [which] has necessitated individual and subjective judgments—in too many cases arbitrary, discriminatory and capricious—thus opening the door to repeated instances of corruption and loss of public confidence."

4. Mr. Phillips' affidavit further states that brand owners will be able to determine the lowest price at which they sell elsewhere in the nation because they are currently complying with contracts entered into with the Alcoholic Beverage Control Commissions of the various "control" states, [fol. 321] whereby brand owners agree to charge the individual State Control Authority a price no higher than the lowest charged elsewhere in the country.

5. My experience in the industry leads me to the conclusion that, notwithstanding these contracts with the control states, brand owners (and, necessarily, any wholesaler designated as an agent of a brand owner) will not be able to comply with the price affirmation provisions of Section 9 of Chapter 531, Laws of 1964. These contracts with the "control" states are voluntary in nature, whereas Chapter 531 is mandatory. If a brand owner should breach one of these contracts, he is faced only with a demand for compensation by the relevant State Authority. However, if one is charged with making an affirmation pursuant to Section 9 of Chapter 531 and does so erroneously, he is faced with up to six months in jail and loss of his New York license.

6. Further, while it is true that contracts such as those in force in Pennsylvania require a brand owner to reflect

in his Pennsylvania price "special cash or commodity allowances, post-off or discounts", Section 9 of Chapter 531 requires a new determination of the elements of a brand owner's price, for it speaks in terms of "rebates, free goods, *allowances and other inducements of any kind whatsoever offered or given*" to any purchaser elsewhere in the country. (Italics added.) It can be seen that the procedures used to comply with the "control" state contracts will not necessarily be of assistance in meeting the requirements of the new Act.

7. Finally, it should be noted that these contracts with the "control" states only apply to the price at which the brand owner-signer sells to his customers elsewhere in the United States and does not force him to attest to the prices charged by anyone else. By contrast, Section 9 of Chapter [fol. 322] 531, in addition to requiring a brand owner to affirm, at the risk of criminal penalty, that his price to wholesalers and retailers in New York is as low as his price elsewhere in the country, further requires him to affirm that the prices of independent wholesalers who sell to New York retailers and who are statutorily deemed to be "related" to the brand owner are no higher than the lowest price at which wholesalers who are "related" to the brand owner sell to retailers elsewhere in the country.

8. In making "discounts * * * rebates, free goods allowances and other inducements of any kind whatsoever offered or given" to any purchaser elsewhere in the country an element of New York price of a particular item of liquor, Section 9 of Chapter 531 imposes statutory standards too vague to be obeyed. Mr. Phillips' affidavit states that these standards have been part of the Alcoholic Beverage Control Law of New York for more than twenty years and that a number of administrative rulings and determinations have been made by the Authority defining these terms for members of the industry.

9. To the best of my knowledge and belief, no such definitions have been promulgated, and it is also my belief that,

along with myself, others in the industry will not be able to determine with certainty how these terms are to be defined.

10. Mr. Phillips also expresses a belief in his affidavit that there will be little doubt among brand owners as to who comes within the definition of a "related" person.

11. In my opinion, based upon my experience and knowledge of the industry, there will indeed be no consensus among those in the industry as to who is a "related" person. No law in any other state has imposed a similar re- [fol. 323] quirement upon the industry, and there is thus no precedent to assist the industry in meeting this statutory standard.

12. In his affidavit, Mr. Phillips affirms that the State Liquor Authority, by formulating regulations, stands ready to assist members of the industry in determining who is a "related" person. Yet Amended Rule 16 of the Authority, promulgated before the effective date of Section 9 of Chapter 531, makes no effort to define "related" person, even though, on information and belief, several industry representatives made a specific request that the Authority attempt to define the term in Amended Rule 16.

13. Mr. Phillips asserts that Section 7 of Chapter 531 does not require brand owners to file a schedule of prices charged wholesalers in states other than New York, because the term "wholesaler", as defined in Section 3 of the Alcoholic Beverage Control Law, includes "any person who sells at wholesale any beverage * * * [for] which a license is required * * *." It is apparently Mr. Phillips' position that the phrase "irrespective of place of sale or delivery" added to Section 101-b-3(a) of the Alcoholic Beverage Control Law by Section 7 of Chapter 531 does not broaden the category of sales to wholesalers which must be the subject of price filing schedules.

14. It is clear under the interpretation of the prior law that a brand owner must file his price to a wholesaler selling

in New York even though the actual sale may have occurred at the brand owner's distillery outside of New York. Thus, in the view of Mr. Phillips, the amendments of Chapter 531 are superfluous.

15. However, if the new requirement of filing schedules of prices charged wholesalers "irrespective of place of sale [fol. 324] or delivery" is viewed with knowledge of the legislative background of Sections 7 and 9 of Chapter 531, the legislative intent to require the filing of prices charged wholesalers doing business solely in other states becomes clear.

16. Senator Zaretzki, an advocate of the no higher than the lowest price sections of Chapter 531, submitted an earlier bill embodying the basic provisions of what is now Section 9 of Chapter 531, in which brand owners were required to maintain a list of prices charged wholesalers in states other than New York. The purpose was evidently to provide a convenient way to ascertain if the price charged New York wholesalers was actually no higher than the lowest charged wholesalers elsewhere.

17. The new provision embodied in Section 7 of Chapter 531 requiring brand owners to file a schedule of prices to wholesalers "irrespective of place of sale or delivery" would seem to serve the same purpose as Senator Zaretzki's earlier bill. This conclusion is reinforced when one considers the alternative suggested by Mr. Phillips which would render the new language superfluous.

(Sworn to by John F. O'Connell, December 26, 1964.)

[fol. 325]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

Index No. 6127-64.

JOSEPH E. SEAGRAM & SONS, INC., *et al.*, Plaintiffs,

against

DONALD S. HOSTETTER, Chairman, JOHN C. HART, WILLIAM H. [illegible]GAN, BENJAMIN H. BALCOM, ROBERT E. DOYLE, constituting the State Liquor Authority, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York, Defendants.

Supreme Court, Albany County Special Term, December 28, 1964

Calendar #10-241

Appearances:

Lord, Day & Lord, Esqs., Attorneys for Plaintiffs, 25 Broadway, New York 4, New York.

Louis J. Lefkowitz, Attorney General, Attorney for Defendants, The Capitol, Albany, New York 12224.

OPINION—April 19, 1965

Staley, Jr., J.:

This is a motion for an order restraining the defendants pending the determination of the issues in this action from:

1. Requiring plaintiffs to comply in any manner with any part of section 9, ch. 531 of the Laws of 1964.

[fol. 326] 2. Requiring those plaintiffs who sell their brands of liquor to wholesalers located in other states as well as to wholesalers in the State of New York to file a

schedule of prices at which such liquor is sold to wholesalers in states other than New York "irrespective of the place of sale or delivery" as required by section 7, ch. 531 of the Laws of 1964.

3. Requiring plaintiffs to include in their schedule of prices filed pursuant to section 101-b of the Alcoholic Beverage Control Law the "net bottle and case price paid by seller" as required by section 7, ch. 531 of the Law of 1964.

A cross-motion is made by the defendants for an order dismissing the complaint herein or, in the alternative, for judgment declaring section 9 of ch. 531 of the Laws of 1964 and section 7, subdv. 3 (a) of ch. 531 of the Laws of 1964 to be in all respects constitutional and valid. Section 7 and section 9, as herein referred to, in each instance shall mean section 7 and section 9 of ch. 531 of the Laws of 1964.

Section 9 added new paragraphs (d), (e), (f), (g), (h), (i), (j) and (k) to subdv. 3 of section 101-b of the Alcoholic Beverage Control Law. Section 7 enacted certain amendments to subdvs. 2, 3 and 4 of section 101-b and added new subdv. 6 to said section.

The provisions of section 7 require monthly schedules of brand owners', distillers' or manufacturers' bottle and case prices and discounts to wholesalers, as well as the net bottle and case price paid by the seller and of wholesalers' prices and discounts to retailers. The sale of liquor or wine to or by a wholesaler or retailer is prohibited unless the required schedules are filed and, in the case of a wholesaler, such prohibition applies irrespective of the place of sale or delivery. Schedules are not required to be filed for an item under a brand owned exclusively [fol. 327] by one retailer and sold at retail within the state exclusively by such retailer.

Discrimination in price or discounts and the granting of discounts other than as provided in the section is declared to be unlawful. Penalties are also provided for making any sale or purchase in violation of the provisions of the section or for making a false statement in any schedule

or for failing or refusing to comply with the provisions of the section.

In essence section 9 requires that, in addition to the schedules required by section 7, there must be filed an affirmation by the brand owner, or by the wholesaler designated as agent for the purpose of filing the schedule if the owner of the brand is not licensed by the liquor authority that the bottle and case price of liquor to wholesalers set forth in the schedule is no higher than the lowest price at which such item was sold by such brand owner or such wholesaler or any related person to any wholesaler anywhere in any other state of the United States or in the District of Columbia or to any state which owns and operates retail liquor stores in the month immediately preceding the month in which the schedule is filed. A similar affirmation is required concerning sale to retailers. In the event an affirmation is not filed with respect to an item of liquor the schedule for which the affirmation is required is deemed invalid and such item may not be sold to or purchased by a wholesaler during the period covered by the schedule. Provision is made for determining the lowest price for which any item was sold elsewhere and the making of a false statement in an affirmation is declared to be a misdemeanor.

The intent of the Legislature in making these amendments is set forth in section 8 which provides as follows:

> "In enacting section eleven of this act, it is the firm intention of the legislature (a) that fundamental principles of price competition should prevail in the manu- [fol. 328] facture, sale and distribution of liquor in this state, (b) that consumers of alcoholic beverages in this state should not be discriminated against or disadvantaged by paying unjustifiably higher prices for brands of liquor than are paid by consumers in other states, and that price discrimination and favoritism are contrary to the best interests and welfare of the people of this state, and (c) that enactment of section eleven

of this act will provide a basis for eliminating such discrimination against and disadvantage of consumers in this state. In order to forestall possible monopolistic and anti-competitive practices designed to frustrate the elimination of such discrimination and disadvantage, it is hereby further declared that the sale of liquor should be subjected to certain further restrictions, prohibitions and regulations, and the necessity for the the enactment of the provisions of section nine of this act is, therefore, declared as a matter of legislative determination."

The first two causes of action of the complaint seek a declaratory judgment determining (1) that section 9 is unconstitutional and void in that it deprives the plaintiffs named in the first cause of action of liberty and property without due process of law; it is an arbitrary, capricious and unreasonable exercise of the state's police power; is inconsistent with the declared policy of the Alcoholic Beverage Control Law as expressed in sections 2 and 101-b(1) of that law; it will not serve to cure the possibility of monopolistic and anti-competitive practices; it contravenes the terms and policy of the Sherman Act, 15 U. S. C. sections 1-7; it is in direct conflict with the Robinson-Patman Act, 15 U. S. C. sections 13(a), 13(b), and 21(a); it violates the Constitution of the United States by interfering with commerce among the states; it violates the Constitution of the State of New York and the Constitution of the United [fol. 329] States in that it is discriminatory; (2) that section 7, subdv. 3(a) is unconstitutional and void in that it violates the Constitution of the United States by interfering with commerce among the states and with foreign commerce and deprives the plaintiffs of property without due process of law; (3) that section 9(f) violates the Constitution of the State of New York and the Constitution of the United States in that it deprives the plaintiff named in the second cause of action of liberty and property without due process of law; it is an arbitrary, capricious and unreasonable exercise of the state's policy power; it is likely to cause

unwitting violations of the laws of New York and of other states and of the federal anti-trust laws; it is vague and indefinite.

The third and fourth causes of action of the complaint seek an injunction enjoining and restraining the defendants and their successors from imposing any sanctions or penalties for failure to submit the affirmations and verifications required by section 9 and for failure to file the prices and schedules required to be filed by section 7 on the ground that said sections are unconstitutional and void.

The cross-motion by the defendants for judgment declaring section 9 and section 7, subdv. 3(a) to be, in all respects, constitutional and valid is, in effect, a motion for summary judgment.

In weighing a challenge of unconstitutionality of a statute the Courts observe the legal principles; that a legislative enactment carries with it an exceedingly strong presumption of constitutionality; that every intendment is in favor of the statute's validity; that the heavy burden of demonstrating unconstitutionality beyond a reasonable doubt rests upon the one who attacks a statute as unconstitutional and that only as a last unavoidable result do Courts strike down a legislative enactment as unconstitutional. (*I.L.F.Y. Co.* v. *Temporary State Rent Comm.*, 10 [fol. 330] N. Y. 2d 263; *Wiggins* v. *Town of Somers*, 4 N. Y. 2d 215; *Lincoln Bldg. Assoc.* v. *Barr*, 1 N. Y. 2d 413; *New York State Thruway Authority* v. *Ashley Motor Court*, 12 A. D. 2d 223, affd. 10 N. Y. 2d 151; *Matter of Roosevelt Raceway, Inc.* v. *Monoghan*, 9 N. Y. 2d 293; *Matter of Ahern* v. *South Buffalo Ry. Co.*, 303 N. Y. 545, affd. 344 U. S. 367; *Martin* v. *State Liquor Authority*, 43 Misc. 2d 682, affd. 15 N. Y. 2d 707.)

The judgment of the Courts will not be substituted for that of the Legislature to determine whether the legislation will accomplish the desired end or can be effectively administered.

Courts no longer employ the due process clause of the Constitution to invalidate State Laws regulatory of business and industrial conditions merely because such laws are deemed unwise or improvident. (*Williamson* v. *Lee*

Optical Co., 348 U. S. 483; *Gail Turner Nurses Agency, Inc.* v. *State of New York*, 17 Misc. 2d 273.)

Nor will the Court sit as a superlegislature to weigh the wisdom of each enactment brought before it, or decide whether policy which it expresses offends the welfare of a particular group. (*Day-Brite Light, Inc.* v. *Missouri*, 342 U. S. 421; *Gail Turner Agency* v. *State of New York*, *supra.*)

Nor are legislative enactments rendered invalid as a denial of due process or equal protection under the law because they impose financial hardship, result in reduced income or make it impossible for some to continue in a particular business. (*California Automobile Assn.* v. *Maloney*, 341 U. S. 105; *Breard* v. *Alexandria*, 341 U. S. 622; *Day-Brite Light, Inc.* v. *Missouri*, *supra*; *Gail Turner Agency* v. *State of New York*, *supra.*)

The Legislature is also presumed to have investigated the subject matter of the statute and found facts to support the legislation. (*Martin* v. *State Liquor Authority*, *supra.*) In this instance the Legislature, in addition, had [fol. 331] before it, when it enacted ch. 531 of the Laws of 1964, the Study Papers and Reports of the Moreland Commission. Being an enactment under the police power of the state, the strongest presumption of validity attaches to ch. 531 of the Laws of 1964 and the fact that it causes or might cause an economic hardship to those whom it affects is no argument against its constitutional validity, if it is an otherwise valid exercise of the state's police power. (*N. H. Lyons & Co., Inc.* v. *Corsi*, 3 N. Y. 2d 60.)

Plaintiffs' attack ch. 531 on the basis that it deprives them of liberty and property without due process of law in violation of the Constitutions of the State of New York and of the United States is contained in paragraphs 53, 90 and 91 of their complaint. In essence these paragraphs allege economic hardships, possible reduced profit margins, expenditures for new equipment, possible difficulty in increasing prices and difficulty in competing in other states. These allegations, even if proven, have no bear-

ing on the constitutionality of the statute. (*California Automobile Assn.* v. *Maloney, supra; Breard* v. *Alexandria, supra; Day-Brite Light, Inc.* v. *Missouri, supra; Gail Turner Agency* v. *State, supra.*)

Paragraphs 54, 90 and 94 of the plaintiffs' complaint allege that section 9 is an arbitrary, capricious and unreasonable exercise of the state's police power in that the term related person as defined in section 9 is vague; plaintiffs have no power to compel related persons to furnish them with information; price differentials are limited to state gallonage taxes or fees; it is impossible for plaintiffs to determine in any given month the prices at which brands sold by them in New York are sold to wholesalers and/or retailers throughout the United States and the District of Columbia; it is impossible for plaintiffs to determine what is meant by inducements of any kind whatsoever.

[fol. 332] The choice of measures is for the Legislature who are presumed to have investigated the subject and to have acted with reason not from caprice. "Legislation passed in the exercise of the police power must be reasonable in the sense that it must be based on reason as distinct from being wholly arbitrary or capricious, but when the legislature has power to legislate on a subject, the courts may only look into its enactment far enough to see whether it is in any view adapted to the end intended. If it is, the court must give it effect, however unwise they may regard it, or however much they might, if given the choice, prefer some other measure as more fit and appropriate." (*People* v. *Griswold,* 213 N. Y. 92.)

The provisions of ch. 531 requiring filing price schedules and affirmations is not, in of itself, either arbitrary or unreasonable. Such filings are certainly appropriate to the purpose intended of preventing consumers in New York State from being discriminated against or disadvantaged by paying unjustifiably higher prices for brands of liquor than are paid by consumers in other states. The fact that the plaintiffs might find it difficult to obtain the required information or are limited by the act in the price differen-

tials allowed, does not make the act arbitrary, capricious and unreasonable.

Plaintiffs' allegations concerning the vagueness of the terms "related person" and "inducements of any kind whatever" are equally without merit. Subdivision 4 of section 7 provides that "The liquor authority may make such rules as shall be appropriate to carry out the purpose of this section." The section referred to is section 101-b of the Alcoholic Beverage Control Law.

The Legislature may and in many cases has enacted statutes in broad outline, leaving to administrative officials enforcing them the duty of arranging the details. (*Matter of National Surety Co.*, 239 App. Div. 490, affd. 264 N. Y. 473; *Matter of People* [*International Workers Order*], 199 [fol. 333] Misc. 941, affd. 280 App. Div. 517, affd. 305 N. Y. 258; *Martin* v. *State Liquor Authority, supra.*) The Legislature often delegates to an executive officer the power to determine facts and conditions upon which the operation of a statute depends. This delegation of power relates to the execution of the law rather than to the making of the law. There is no valid objection to such a delegation of power. (*Tropp* v. *Knickerbocker Village, Inc.*, 205 Misc. 200, affd. 284 App. Div. 935; *Martin* v. *State Liquor Authority, supra.*)

Plaintiffs' contentions that section 9 is inconsistent with the declared policy of the Alcoholic Beverage Control Law to promote temperance and that section 9 will not serve to cure the possibility of monopolistic and anticompetitive practices at which it is directed are equally insufficient to prove invalidity of the statute.

Paragraphs 57, 58 and 59 of the plaintiffs' complaint consist of allegations that section 9 contravenes the terms and policy of the Sherman Act, 15 U. S. C. sections 1 through 7 and is in direct conflict with the Robinson-Patman Act, 15 U. S. C., sections 13(a), 13(b) and 21(a) and, therefore, must yield to the supremacy of such laws as required by Article VI of the Constitution of the United States.

Paragraph 60 of the plaintiffs' complaint consists of an allegation that section 9 violates the Constitution of the United States by interfering with commerce among the states.

There is no doubt that under the twenty-first amendment of the Constitution of the United States that the State of New York may not only regulate, but may completely prohibit the importation of some or all intoxicants destined for use or consumption within its borders and may also restrict, prevent, regulate and control by taxation or otherwise, the distribution, use or consumption of intoxicants within the state. (*California* v. *Washington,* 358 U. S. 64; [fol. 334] *Department of Revenue* v. *James B. Beam Distilling Co.,* 377 U. S. 341; *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.,* 377 U. S. 324.)

The Alcoholic Beverage Control Law of the State of New York concerns itself solely with the regulation and control of the manufacture, sale and distribution within the State of New York of alcoholic beverages. (Alcoholic Beverage Control Law, section 2.) Any effect which it has on interstate commerce is entirely coincidental. The regulation and control of the sale and distribution of alcoholic beverages is a matter of local concern and the mere fact that such regulations have or may have some repercussions upon the activities of a business which operates nationwide does not invalidate the state action, particularly where the subject of the action is within the police power of the state. (*Osborn* v. *Ozlin,* 310 U. S. 53; *Southern Pacific Co.* v. *Arizona,* 325 U. S. 761; *Watson* v. *Employers Liability Corp.,* 348 U. S. 66.)

On the other hand the commerce clause of the United States Constitution, the Sherman Act and the Robinson-Patman Act are all concerned with interstate commerce as distinguished from intrastate commerce. Since the purpose of the Alcoholic Beverage Control Law is to regulate and control the intrastate sale and distribution of alcoholic beverages, it does not come within the realm of the

commerce clause of the United States Constitution nor of the Sherman Act or of the Robinson-Patman Act.

Paragraph 61 of the plaintiffs' complaint consists of an allegation that section 9 violates the Constitution of the State of New York by discriminatingly imposing maximum price limitations upon sales made by persons dealing in liquor sold under "private labels" and sales made by vintners and wholesalers of wine.

"The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." (*Tigner* v. *Texas,* 310 U. S. 141.) [fol. 335] The fact that the Legislature omitted certain ones who might have been included in the statute, does not render it unconstitutional. (*New York Rapid Transit Corp.* v. *City of New York,* 275 N. Y. 258; *People* v. *Charles Schweinler Press,* 214 N. Y. 395; *National Psychological Assoc.* v. *University of State of New York,* 8 N. Y. 2d 197.)

"So long as there is some real difference in the situation, interests and capacity of different classes of citizens, this may be the basis of legislative classification which has a real and reasonable relationship to the difference which thus exists." (*People* v. *Klinck Packing Co.,* 214 N. Y. 121.)

The Legislature is also presumed to have investigated the subject matter of the legislation and based upon said investigation determined that a different classification should exist for brand owners, private brands and vintners.

Paragraph 63 of the plaintiffs' complaint consists of an allegation that paragraph 3(a) of section 7 violates the Constitution of the United States by requiring schedules for sales "irrespective of the place of sale or delivery" thereby interfering with commerce among the states and with foreign commerce and that the requirement of such schedules to contain the "net bottle and case price paid by the seller" deprives plaintiffs of property without due process of law and is an arbitrary, capricious and unreasonable exercise of the state's police power.

The fallacy of this allegation is in the fact that the plaintiffs fail to take into consideration the purpose of section 7 as is set forth in subdv. (1) thereof and also fail to take into consideration the saving clause or provision in subdv. 3(a).

Subdivision one provides: "It is the declared policy of the state that it is necessary to regulate and control the manufacture, sale and distribution within the state of alcoholic beverages * * *." This language sets forth words [fol. 336] of limitation and limits the applicability of the law to regulation and control within the state.

Subdivision 3(a) which contains the words "irrespective of the place of sale and delivery" also contains a savings clause which provides as follows: "Such brand of liquor or wine shall not be sold to wholesalers except at the price and discounts then in effect unless prior written permission of the authority is granted for good cause shown and for reasons not inconsistent with the purpose of this chapter."

Thus a licensee may purchase liquor for reasons not inconsistent with the purpose of this chapter upon obtaining prior written permission of the authority. It goes without saying that a purchase or sale to a wholesaler for sale or distribution in interstate or foreign commerce would be a purpose not inconsistent with this chapter. The requirement that a licensee obtain prior permission to make such purchases or sales is not such a burden on interstate commerce as to render it invalid under the Commerce Clause of the United States Constitution, particularly when it is taken into consideration; that the term "wholesaler" means licensed wholesaler (section 3, subdv. 35 of the Alcoholic Beverage Control Law) that section 62 of said law permits a licensed wholesaler "to sell and deliver to persons outside the state pursuant to the laws of the place of sale and delivery; that the state has the power to require its licensees to make all reports which it deems necessary to be made by any licensee (section 17, subdv. 8 of the Alcoholic Beverage Control Law; amendment 21, United

States Constitution) and that the state and the Liquor Authority have the right and power to refuse to issue any license or permit provided for in the Alcoholic Beverage Control Law.

Plaintiffs' allegation in this paragraph of their complaint of a violation of due process stands in no better position than their similar allegations in paragraphs 54, 90 and 94 [fol. 337] of their complaint. The allegation that the requirement that "net bottle and case price paid by the seller" in no way serves to carry out the policy of the Alcoholic Beverage Control Law is a mere conclusion not supported by fact.

Further, the information would appear to have some value in determining whether the fundamental principles of price competition prevails in the industry and in determining whether unjustifiable prices are being charged to consumer in the state. Thus, this part of the legislation appears to be adapted to the end intended by section 8 of ch. 531. The Court must, therefore, give it effect. (*People* v. *Griswold, supra.*)

It, thus, clearly appears that the plaintiffs have failed to sustain the burden of demonstrating the unconstitutionality beyond a reasonable doubt. It is, therefore, the opinion of the Court that the sections in question are constitutional. There being no clear question of fact presented here, declaratory judgment may be appropriately directed. (*Martin* v. *State Liquor Authority, supra.*)

The motion to dismiss the complaint is denied and judgment is directed in favor of the defendant declaring section 9 and section 7, subdv. 3(a) of ch. 531 of the Laws of 1964 to be, in all respects, constitutional and valid.

Plaintiffs' application for a preliminary injunction is denied.

Attorney for defendants to submit order.

All papers to the attorney for defendants for filing upon entry of the order herein.

[fol. 338]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

Index No. 6127-64

JOSEPH E. SEAGRAM & SONS, INC., *et al.*, Plaintiffs,

against

DONALD S. HOSTETTER, Chairman, JOHN C. HART, WILLIAM H. MORGAN, BENJAMIN H. BALCOM, ROBERT E. DOYLE, constituting the State Liquor Authority, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York, Defendants.

At a Special Term of the Supreme Court of the State of New York held in and for the County of Albany, at the Court House in the City of Albany, on the 28th day of December, 1964.

Present: Hon. Ellis J. Staley, Jr., Justice.

ORDER—April 19, 1965

Plaintiffs having brought an action for judgment declaring unconstitutional section 9 of chapter 531 of the Laws of 1964 and that part of subdivision 3 (a) of section 7 of chapter 531 of the Laws of 1964 which requires that schedules of prices to wholesalers contain the net bottle and case price paid by the seller and which requires that no brand of liquor or wine shall be sold to or purchased by a wholesaler irrespective of the place of sale or delivery unless a schedule is filed, insofar as it may require schedules of prices of sales to wholesalers in other States than New York; and plaintiffs having moved by order to show cause for an order restraining defendants pending the determination of the issues in this action from (1) requiring plaintiffs to comply in any manner with any

part of section 9, chapter 531 of the Laws of 1964, from (2) requiring those plaintiffs who sell their brands of liquor to wholesalers located in other States as well as to wholesalers in the State of New York to file a schedule of prices at which such liquor is sold to wholesalers in States other than New York "irrespective of the place of sale or delivery" as required by section 7, chapter 531 of the Laws of 1964, and from (3) requiring plaintiffs to include in their schedule of prices filed pursuant to section 101-b of the Alcoholic Beverage Control Law the "net bottle and case price paid by seller" as required by section 7, chapter [fol. 339] 531 of the Laws of 1954; and a stay having on October 29, 1964 been granted by Hon. Russell G. Hunt, Justice of the Supreme Court, staying defendants until the hearing and determination of the motion and the entry of the order thereon from requiring plaintiffs to comply with any part of said section 9 and with said section 7, subdivision 3 (a) as set forth in items (2) and (3) above; and defendants having made a cross-motion for an order dismissing the complaint herein, or in the alternative, for judgment declaring section 9 of chapter 531 of the Laws of 1964 and section 7, subdivision 3 (a) of chapter 531 of the Laws of 1964 to be in all respects constitutional and valid; and said motion and cross-motion having come on to be heard before this Court on January 4, 1965, and having been argued by Thomas F. Daly, Esq., of Counsel for Lord, Day & Lord, attorneys for plaintiffs, and Ruth Kessler Toch, Assistant Solicitor General, for Hon. Louis J. Lefkowitz, Attorney General of the State of New York, attorney for defendants, and due deliberation having been had thereon, and this Court having rendered its decision holding section 9 and section 7, subdivision 3 (a) of chapter 531 of the Laws of 1964 to be in all respects constitutional and valid and denying the motion to dismiss the complaint and directing judgment in favor of the defendants declaring section 9 and section 7, subdivision 3 (a) of chapter 531 of the Laws of 1964 to be in all respects constitutional and valid and denying plaintiffs' application for preliminary injunction;

Now, on reading and filing the order to show cause, the affidavit of Thomas F. Daly, sworn to October 28, 1964, and the exhibits attached thereto, the affidavits of Frederick J. Lind, sworn to October 20, 1964, of Joseph D. Cotler, sworn to October 21, 1964, of Raymond Revit, sworn to October 27, 1964, of Walter J. Devlin, sworn to October 23, 1964, of D. L. Street, sworn to October 20, 1964, of R. R. Herrmann, Jr., sworn to October 20, 1964, of Ira [fol. 340] R. Schattman, Jr., sworn to October 22, 1964, of Frank T. Hypps, sworn to October 28, 1964 and the exhibit attached thereto, of Jack Goodman, sworn to October 15, 1964, of Jack W. Marer, sworn to August 21, 1964 and the exhibits attached thereto, of Chester F. McNamara, sworn to August 21, 1964, of Charles W. Sand, sworn to August 25, 1964, of William Steinberg, sworn to August 25, 1964, all in support of plaintiffs' motion for temporary restraining order and preliminary injunction; the summons and verified complaint; the answer of defendants verified by Donald S. Hostetter, Chairman of the State Liquor Authority, on December 21, 1964; defendants' notice of cross-motion pursuant to CPLR 2215 for an order dismissing the complaint herein or in the alternative for judgment declaring section 9 of chapter 531 of New York Laws of 1964 and section 7, subdivision 3 (a) of chapter 531 of New York Laws of 1964 to be in all respects constitutional and valid, and the affidavits of Ruth Kessler Toch and William E. Phillips in support thereof, both sworn to December 22, 1964; the affidavit of John F. O'Connell, sworn to December 26, 1964, in opposition to defendants' said cross-motion; and on filing the opinion of this Court dated April 9, 1965, in favor of defendants, on motion of Hon. Louis J. Lefkowitz, Attorney General, attorney for defendants herein, it is

Ordered that the motion to dismiss the complaint is denied and that defendants have judgment declaring section 9 and section 7, subdivision 3 (a) of chapter 531 of the Laws of 1964 to be in all respects constitutional and valid; and it is

Further ordered that plaintiffs' application for preliminary injunction is denied; and it is

Further ordered that the interim stay heretofore granted herein is in all respects vacated; and it is

[fol. 341] Further ordered that the Clerk of this Court is hereby directed to enter judgment in favor of defendants accordingly.

Signed: April 19, 1965

Ellis J. Staley, Jr., Justice of the Supreme Court.

Enter April 21, 1965

[fol. 342]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

Index No. 6127-64

At a Special Term of the Supreme Court of the State of New York held in and for the County of Albany, at the Court House in the City of Albany, on the 28th day of December, 1964.

Present: Hon. Ellis J. Staley, Jr., Justice.

JOSEPH E. SEAGRAM & SONS, INC., *et al.*, Plaintiffs,

against

DONALD S. HOSTETTER, Chairman, JOHN C. HART, WILLIAM H. MORGAN, BENJAMIN H. BALCOM, ROBERT E. DOYLE, constituting the State Liquor Authority, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York, Defendants.

JUDGMENT—April 19, 1965

An order having been signed on April 19, 1965, granting judgment to the defendants herein declaring section 9

and section 7, subdivision 3 (a) of chapter 531 of the Laws of 1964 to be in all respects constitutional and valid;

Now, on motion of Hon. Louis J. Lefkowitz, Attorney General of the State of New York, attorney for defendants herein, it is

Adjudged and decreed that section 9 and section 7, subdivision 3 (a) of chapter 531 of the Laws of 1964 are in all respects constitutional and valid.

Signed: April 19, 1965.

Ellis J. Staley, Jr., Justice of the Supreme Court.

Enter April 21, 1965

To:

Louis J. Lefkowitz, Esq., Attorney General of the State of New York, Attorney for Defendants, The Capitol, Albany 1, New York.

[fol. 343]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

NOTICE OF APPEAL—April 21, 1965

Sirs:

Please Take Notice, that the plaintiffs above named hereby appeal to the Appellate Division of the Supreme Court of New York, Third Department, from so much of the order of Mr. Justice Ellis J. Staley, Jr. dated the 19th day of April, 1965 and entered in the office of the Clerk of Albany County on the 21st day of April, 1965 as denies the plaintiffs' motion for a preliminary injunction and grants the defendants' motion for a declaratory judgment, and from the judgment entered thereon in the office of the Clerk of Albany County on the 21st day of April, 1965.

Dated: New York, N. Y., April 21, 1965.

Yours, etc.

Lord, Day & Lord, Attorneys for Plaintiffs, Office & P. O. Address, 25 Broadway, New York, N. Y. 10004.

[fol. 344]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT

8017

JOSEPH E. SEAGRAM & SONS, INC., *et al.*, Appellants,

v.

DONALD S. HOSTETTER, *et al.*, Constituting the State Liquor Authority, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York, Respondents.

OPINION—May 13, 1965

Per Curiam.

Appeal (1) from so much of an order of the Supreme Court at Special Term as denied plaintiffs' motion for a preliminary injunction and granted defendants' cross-motion for summary judgment awarding declaratory judgment, as demanded in the counterclaim, that certain acts amendatory of the Alcoholic Beverage Control Law are constitutional and otherwise valid, and (2) from the judgment entered upon said order. (Opinion: Misc. 2d .) Motion for a temporary restraining order.

The action is brought by distillers, importers and wholesalers of liquor sold in New York for judgment (1) declaring that the provisions of section 9 of chapter 531 of the Laws of 1964, amending subdivision 3 of section 101-b of the Alcoholic Beverage Control Law, and certain

of the provisions of section 7 of said chapter, amending paragraph (a) of subdivision 3 of section 101-b of the same act, are invalid as violative of the commerce and [fol. 345] supremacy clauses of the Constitution of the United States (U. S. Const., art. 1, §8, cl. 3; art. VI, cl. 2) and as violative, also, of the due process and equal protection clauses of the Constitutions of the United States and the State of New York (U. S. Const., 14th Amdt., §2; N. Y. Const., art. I, §§6, 11), and (2) enjoining the imposition of penalties for failure of compliance with such allegedly invalid provisions.

Appellants' many-pronged attack is directed principally to the provisions requiring, in substance, that each distiller and wholesaler offer New York purchasers in respect of each brand sold by him a price no higher than the lowest price at which such item was sold elsewhere in the United States as shown by schedules and affirmations required to be filed by him.

The case thus involves important constitutional questions respecting legislation of social consequence and of wide application; it is well and thoroughly briefed and is presented upon an adequate record; it will, most likely, be further reviewed; and under all these circumstances we deem it the function of this intermediate appellate court to reach its determination promptly and to state it succinctly and without elaboration.

The legislative policy sought to be effectuated by the amendments in dispute was declared to be, among other things, to foster price competition, to eliminate discrimination against New York consumers and "to forestall possible monopolistic and anti-competitive practices designed to frustrate the elimination of such discrimination", price discrimination and favoritism being found "contrary to the best interests and welfare of the people of this state." (L. 1964, ch. 531, §8.)

Neither in the record nor in appellants' argument do we find a substantial basis for the assertion that equal protection has been denied. In the light of the legis-

lative history and studies and, so far as applicable, the [fol. 346] studies and reports of the Moreland Act Commission, and upon our finding that the strong supportive presumptions have not been overcome, we conclude that the enactment constitutes a valid exercise of the police power and effects no deprivation of due process.

Appellants argue forcefully that the maximum price provisions of the amendments contravene the Robinson-Patman Act (U. S. Code, tit. 15, §§ 13 *et seq.*) and the Sherman Act (U. S. Code, tit. 15, §§1-7), and thus are violative of the supremacy clause and the challenged amendments offend the commerce clause as well. The complete answer is, we believe, that the legislation lies well within the area of liquor traffic regulation in which, under the Federal Constitution, effective control may be exercised by the States. (U. S. Const., 21st Amdt., §2; *State Bd. of Equalization* v. *Young's Market Co.*, 299 U. S. 59; *Mahoney* v. *Joseph Triner Corp.*, 304 U. S. 401; *Indianapolis Brewing Co.* v. *Liquor Control Comm.*, 305 U. S. 391; *Finch & Co.* v. *McKittrick*, 305 U. S. 395.) The later authorities, upon which appellants principally rely (see, e. g., *United States* v. *Frankfort Distilleries*, 324 U. S. 293; *Hostetter* v. *Idlewild Bon Voyage Liq. Corp.*, 377 U. S. 324; *Department of Revenue* v. *James B. Beam Distilling Co.*, 377 U. S. 341), seem readily distinguishable from the older cases, above cited, and from the case before us. In *Frankfort* was involved a criminal prosecution, which the Court held (p. 299) was not barred by the 21st Amendment, which "has not given the states plenary and exclusive power to regulate the conduct of persons doing an interstate liquor business outside their boundaries"; and the Court was careful to point out (p. 299) that the Sherman Act "is not being enforced in this case in such manner as to conflict with the law of Colorado." Unlike the case before us, neither *Idlewild* nor *Beam* concerned an attempt by a State to exert *internal* control, within the ambit of the 21st Amendment, but, rather, involved taxing procedures long recognized as illegal.

[fol. 347] Appellants' remaining contentions seem to us unsubstantial and do not require discussion.

Judgment affirmed, with costs. Motion for temporary restraining order denied, without costs. Application for permission to appeal to the Court of Appeals granted, without costs.

Gibson, P. J., Herlihy, Taylor, Aulisi and Hamm, JJ., concur.

[fol. 348]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT

At a Term of the Appellate Division of the Supreme Court in and for the Third Judicial Department, held at the Courthouse in the City of Albany, New York, commencing on the 26th day of April, 1965.

Present: Hon. James Gibson, Presiding Justice. Hon. J. Clarence Herlihy, Hon. Donald S. Taylor, Hon. Felix J. Aulisi, Hon. Herbert D. Hamm, Associate Justices.

County Clerk's Index No. 6127—64.

JOSEPH E. SEAGRAM & SONS, INC., *et al.*, Appellants,

against

DONALD S. HOSTETTER, Chairman, JOHN C. HART, WILLIAM H. MORGAN, BENJAMIN H. BALCOM, ROBERT E. DOYLE, constituting the State Liquor Authority, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York, Respondents.

ORDER OF AFFIRMANCE AND GRANTING LEAVE TO APPEAL TO COURT OF APPEALS—May 14, 1965

Plaintiffs having appealed from the judgment of the Supreme Court, Albany County, entered in the office of the

Clerk of Albany County on the 21st day of April, 1965, declaring Section 9 and Section 7, subdivision 3(a) of Chapter 531 of the Laws of 1964 to be in all respects constitutional and valid, and from the order of the Supreme Court, [fol. 349] Albany County, entered in the office of the Clerk of Albany County on the 21st day of April, 1965, pursuant to which order said judgment was entered, and from the denial by said order of plaintiffs' motion for preliminary injunction and the granting by said order of defendants' cross-motion for a declaratory judgment, and said appeal having been presented during the above stated term of this Court, and having been argued by Thomas F. Daly, Esq., of Counsel for the appellants, and by Ruth Kessler Toch, Esq., Assistant Solicitor General, of Counsel for respondents, and, after due deliberation, the Court having rendered a decision on the 13th day of May, 1965, it is hereby

Ordered, that the judgment of the Supreme Court be and it hereby is affirmed with costs; the motion for temporary restraining order is denied without costs; application for permission to appeal to the Court of Appeals is granted without costs.

Enter:

John J. O'Brien, Clerk.

Dated and Entered: May 14, 1965.

John J. O'Brien, Clerk.

[fol. 350]

CERTIFICATION PURSUANT TO CPLR, SECTION 2105—
May 20, 1965

I, GENE R. MCHAM, an attorney duly admitted and licensed to practice in the State of New York and associated with Lord, Day & Lord, attorneys for the plaintiffs-appellants in this action, do hereby certify, pursuant to CPLR, Section 2105, that the foregoing printed record on appeal to the Appellate Division, Third Department, and the foregoing printed additional papers to the Court of Appeals

consisting of the order of the Appellate Division appealed from and granting leave to appeal to the Court of Appeals and the opinion of the Appellate Division have been personally compared by me with the original record on appeal to the Appellate Division, Third Department, and said additional papers to the Court of Appeals and found to be true and complete copies of the said originals and the whole thereof now on file in the office of the Clerk of the County of Albany and in the office of the Clerk of the Appellate Division, Third Department.

Dated: May 20, 1965.

Gene R. McHam.

[fol. 351]

IN THE COURT OF APPEALS FOR THE STATE OF NEW YORK

JOSEPH E. SEAGRAM & SONS, INC., et al., Appellants, v. DONALD S. HOSTETTER et al., Constituting the State Liquor Authority, et al., Respondents.

OPINION—July 9, 1965

Appeal, by permission of the Appellate Division of the Supreme Court in the Third Judicial Department, from an order of said court, entered May 14, 1965, which unanimously affirmed a judgment of the Supreme Court, entered in Albany County upon an order of the court at Special Term (Ellis J. Staley, Jr., J.; opinion 45 Misc 2d 956) declaring section 7 (subd. 3 par. [a]) and section 9 of chapter 531 of the Laws of 1964 constitutional and valid.

Thomas F. Daly, Herbert Brownell, Gerald A. Navagh and *Gene R. McHam* for appellants.

Louis J. Lefkowitz, Attorney-General (*Ruth Kessler Toch, Paxton Blair* and *Robert L. Harrison* of counsel), for respondents.

Harold E. Blodgett for Service Liquor Distributors, Inc., and another, *amici curiae.*

Bergan, J. In 1963 in response to malfunctions in the administration of the State's liquor law and public dissatisfaction with controls on the sale of alcoholic beverages, the Governor appointed a Moreland Commission directed to make a "study and reappraisal" of the law.

In appointing the commission the Governor noted that since the enactment of the Alcoholic Beverage Control Law in 1934, soon after the end of prohibition, there had been "no major reappraisal or revision of the law in the light of experience and current social problems and economic conditions".

The commission addressed itself, among other things, to the price of liquor in New York and the effect of price on temperance in the use of liquor. One of the basic assumptions of the statute then in effect was that, if the price of liquor were cheap, its consumption would increase and the policy effected by the statute was to sustain the price.

Former section 101-c of the Alcoholic Beverage Control Law had authorized a manufacturer who was a "brand" owner to fix the minimum retail prices for that brand, for the violation of which the retailer was subject to discipline by the State Liquor Authority (subd. 7). The statute (§ 101-b, subd. 3) had for over 20 years also provided for filing price schedules by brand owners and wholesalers.

The commission's studies led it to believe that the assumed favorable relation of high-priced liquor to temperance was chimerical. The prices of liquor in New York were high, but consumption had steadily risen and this did [fol. 352] not indicate high prices increased temperance. It found "a greater than average" increase in per capita consumption in New York (Moreland Comm. Report No. 1, p. 3).

The principal benefit from the minimum price requirement for liquor in New York went to the liquor interests. This served "merely", said the commission, "to insure profit margins of the various segments of the industry" (Report No. 3, p. 19, offered as Exhibit E by plaintiffs at Special Term) and "The argument that high prices promote tem-

perance in that they keep liquor out of the hands of those who should not have it" is "unfounded" (*id.*, p. 17).

Its studies showed no correlation between consumption and prices, looking at the experience in States in which prices were high compared with those in which they were low.

It found in effect gross price discrimination against the New York consumer by the industry. It developed that the retail price for a fifth of a well-known brand of liquor was lower in Washington, D. C. than the wholesale price in New York. One brand, for example, cost $2.85 retail in Washington and $3.45 wholesale in New York, another $3.39 and $4.15 respectively (see Report No. 3, pp. 5, 6).

This report adds: "For almost every fifth of whiskey that he buys, the New York consumer pays 50 cents to $1.50 more than the price at which it is available in at least seven freer price markets" (p. 3).

On the basis of these reports the Governor made recommendations to the Legislature (Message, Feb. 10, 1964). He observed that the administration of the State's liquor law had been marked by "periodic instances of corruption and favoritism". He noted the favored position of the liquor industry in an area which was the subject of public regulation and that the Moreland Commission had reported "it is contrary to the public interest to have the regulated industry in such a dominant role". He added that the commission had sought means of "Bringing justice to the consumer by putting to an end the artificial devices whereby the liquor industry has received uniquely beneficial treatment at the consumer's expense."

The Governor also noted that as a result of the distiller-fixed consumer prices under the statute a "surcharge" had been "foisted on New Yorkers" of $150 million a year over what would have been paid in a free market.

The result of the commission study and the Governor's recommendations was the enactment of a statute by the Legislature (L. 1964, ch. 531) which, among other things, vitally changed the direction of liquor price policy in New York and sought to reduce consumer prices.

This suit is maintained by 62 distillers and wholesalers of alcoholic beverages and some importers against the State Liquor Authority and the Attorney-General to declare the [fol. 353] provisions of the 1964 statute invalid. The main attack is directed to section 9 of the statute; the other is directed to certain parts of section 7. The court at Special Term in a comprehensive opinion granted judgment for defendants; the Appellate Division affirmed.

In changing the direction of its policy which had been to prevent prices from going too low by establishing effective devices pursuant to which the liquor industry could in effect fix minimum retail prices on brand liquors, the Legislature by section 9 of the 1964 statute set up means which sought to keep down the prices of brand liquors to the consumer. The mechanism is a simple one and it lies technically in the control of the liquor industry. But it is a mechanism to which plaintiffs take vigorous exception on a diversified number of grounds.

The provision is this: On filing the schedules of brand owners' prices to wholesalers, which for 20 years had to be filed monthly under the former provisions of section 101-b, the brand owner or his designee must file an affirmation "that the bottle and case price" to wholesalers in New York "is no higher than the lowest price at which such item of liquor" was sold the previous month to any wholesaler elsewhere in the country or any State or State agency operating a public liquor enterprise (§ 9).

Thus it was sought to end the discrimination by the liquor industry against the New York consumer which, as the commission had found, cost the New York consumer $150 million a year above that which a free market would have offered.

This change from a favored and protected profit position to a possibly sparse profit situation may make it economically difficult for the liquor industry. If it does it is within the competence of the New York Legislature to make it that way. Even without article XXI of the Amendments to the United States Constitution, New York could end the

liquor traffic within its borders entirely. The State of Mississippi, for example, prevents the plaintiffs or anyone else from selling liquor there and no one doubts its power to do so. But the Twenty-first Amendment spells out an additional specific and federally protected right of each State to eliminate as well as regulate the liquor traffic within its borders (*Mahoney* v. *Triner Corp.*, 304 U. S. 401).

A long history of regulation, control, price fixing, place of time and sale setting, and outright extinction lies behind the liquor business in this country since Colonial times, and it is too late today to suggest that the rights of those who choose to engage in it are on a constitutional or legal parity with the rights of people who trade in bicycles, or cosmetics, or furniture.

If the conditions set down by the Legislature are economically impossible for the liquor industry to meet, it will have to accept this impossibility. But we are of opinion they are not economically impossible and that the effect of the 1964 statute will be to reduce liquor profits and pass the benefit of some of them on to New York consumers.

[fol. 354] In effect the dependence of the New York price on the maximum price of the distiller for his brand elsewhere is to tie the price in this State in to a national price. There is nothing unreasonable about that. It is not an interference with interstate commerce. The effect is on what the distiller charges here and is an effect closely associated with the sale and distribution of liquor within the State.

That it reflects and depends on events outside the State does not condemn it. It could as well have been tied into the national average price of liquor or the national cost of living index. It is a device to end a demonstrated discrimination against the New York consumer and it is a device within the power of the State to employ in this regulated activity.

There is in the record proof offered at Special Term by plaintiffs in an exhibit (Exhibit C attached to the affidavit of Thomas F. Daly) consisting of excerpts of the testimony before a legislative committee of Judge Lawrence E. Walsh,

the Moreland Commissioner, who personally opposed the kind of regulation prescribed by section 9, in which the statement is made that in the liquor industry "the whole sum total of that relationship averages out to a price that is average across the country".

He cited Pennsylvania, a monopoly State, "the largest purchaser of liquor in the world * * * $400,000,000 worth of liquor a year—one customer" as being an example of a customer who insists "on the lowest price that the distiller offers anywhere in the country".

In the light of this kind of national marketing situation, the actual difficulty of the distiller in seeing to it that the New York buyer pays no more than "the lowest price" elsewhere seems greatly overstressed.

Under section 9 the distillers themselves control the base price since they fix the lowest price elsewhere. If its effect on New York is too low a price they have it within their power to raise the lowest price elsewhere. The industry must absorb any differential cost in doing business as one of the incidents to a highly regulated industry. The incidental effect of this on prices in another State does not invalidate the New York statute.

The requirement of section 9 is not, indeed, unusual in concept and those States which have State liquor monopolies, we are told, require the distillers to warrant that the price charged the State monopoly for brand liquors is no higher than the price charged in other States. Thus we think the price regulation in the 1964 statute is neither impossible of compliance nor unreasonable.

It is thoroughly settled that when it comes to the regulation of liquor traffic a wide area of public power may be exercised in plenary fashion by State governments without Federal interference either under the commerce clause or under the equal protection provisions of the Constitution.

A leading decision is *State Bd.* v. *Young's Market Co.* (299 U. S. 59) where the court in an opinion by Mr. Justice [fol. 355] Brandeis sustained a State statute imposing a license fee for the privilege of importing beer from other

States against the argument that it violated both the commerce clause and the equal protection clause.

In the same direction is *Mahoney* v. *Triner Corp.* (304 U. S. 401, *supra*); again in an opinion by Justice Brandeis the court sustained a Minnesota statute imposing additional processing conditions on liquor coming from other States, a statute which the court noted "clearly discriminates in favor of liquor processed within the State against liquor completely processed elsewhere" (p. 403).

Similarly discriminating statutes in Michigan which prohibited dealers in beer there from selling beer manufactured in other States which in turn discriminated against beer manufactured in Michigan (*Brewing Co.* v. *Liquor Comm.*, 305 U. S. 391) and to the same effect in Missouri (*Finch & Co.* v. *McKittrick*, 305 U. S. 395) were each sustained. The statute before us could scarcely be deemed to have as much impact on the plaintiffs' Federal rights as these.

In *Ziffrin, Inc.* v. *Reeves* (308 U. S. 132, 138) a Kentucky statute confining the transportation of liquor to licensed common carriers was sustained, with Mr. Justice McReynolds propounding the question: "Having power absolutely to prohibit manufacture, sale, transportation, or possession of intoxicants, was it permissible for Kentucky to permit these things only under definitely prescribed conditions?" And making the answer: "Former opinions here make affirmative answer imperative."

As the Appellate Division opinion noted, nothing in the later decisions of the court upon which appellants mainly rely suggests that the basic power of New York to control the liquor traffic has been impaired. The holding of *United States* v. *Frankfort Distilleries* (324 U. S. 293) is merely that liquor producers, wholesalers and retailers may not conspire unlawfully to fix prices in violation of the Sherman Anti-Trust Act (U. S. Code, tit. 15, § 1 *et seq.*). Nothing in that decision sustains any part of plaintiffs' contention.

And *Hostetter* v. *Idlewild Liq. Corp.* (377 U. S. 324) and *Department of Revenue* v. *James Beam Co.* (377 U. S. 341)

are irrelevant to the case before us. The principles announced in the earlier cases were re-enforced in 1958 in the denial of the application of California to file a bill of complaint against Washington (*California* v. *Washington*, 358 U. S. 64).

On the general exercise of State powers in matters affecting the welfare of a State and its people, liquor aside, see *Hoopeston Co.* v. *Cullen* (318 U. S. 313); *Huron Cement Co.* v. *Detroit* (362 U. S. 440); *Osborn* v. *Ozlin* (310 U. S. 53).

The provisions of section 9 are not transformed into an "anti-trust measure" in conflict with the supremacy clause [Vol. 356] on the basis of plaintiffs' conception that the statute is not "a device to promote temperance"; nor are they for similar reasons in conflict with the Robinson-Patman Act (U. S. Code, tit. 15, § 13 *et seq.*). It is a strained argument to make, as plaintiffs do, that compliance with the compulsion of a public statute which seeks to keep down the price of liquor is the equivalent of an unlawful conspiracy to violate the Sherman Act; and it is almost equally strange to say that, because New York tries to correct an evil in the sale of liquor by providing price criteria operative here, it "will * * * impair * * * the successful operation of alcoholic beverage control laws in other states".

Plaintiffs also attack the validity of portions of section 7 of the 1964 statute which require that filed price schedules show the bottle and case price paid by a retailer, and the portion of the section which prohibits sale or purchase by a wholesaler unless schedules are filed by brand owners "irrespective of the place of sale or delivery".

It is said by appellants that those requirements "can only mean" that sales by brand owners "in every state" must be filed with the New York Authority.

The statute is concerned with New York practices and, if the sales in other States have no relevancy to New York enforcement, the statute permits the Liquor Authority for good cause to waive the general prohibition against sales to wholesalers in the absence of such schedules. It would be reasonable to expect that the statute would be administered

consistently with its sole purpose to regulate the intrastate sale of liquor.

Throughout the argument of plaintiffs on constitutional and other issues runs the thread of their contention that the 1964 statute is not suited to the promotion of temperance and hence the main justification of a valid regulation of liquor is lost.

In summarizing their position in a reply brief plaintiffs say: "At issue here is whether Section 9 of Ch. 531 affirmatively promotes temperance". As to what best promotes temperance among the people of New York it seems preferable to take the opinion of the Governor and the Legislature rather than that of the liquor industry.

The order should be affirmed, with costs.

Chief Judge DESMOND (dissenting). Of plaintiffs' several serious and impressive arguments against the validity of sections 7 and 9 of chapter 531 of the Laws of 1964, one remains unanswered and to my mind unanswerable. It comes down to this: mandatory establishing of minimum prices for sales by bottle or case of "brand name" alcoholic beverages is beyond the power of our State legislation, is an unconstitutional (U. S. Const., 5th and 14th Amdts.; N. Y. Const., art. 1, § 6) taking of private property without due process or compensation, and is not justified as a police power exercise since it is not necessary for or related to the health, safety, morals or welfare of the State's inhabitants or required by any emergency. Bringing New [fol. 357] York State liquor prices into line with those of comparable localities may accord with some concepts of fairness, and our people may have cause to complain about marketing and pricing practices of plaintiffs which are said to result in the charging of premium prices in the package stores of New York State. But we are talking now about constitutional protections against arbitrary interferences by government with free price markets. Statutory price controls on food, housing accommodations or other essentials of life is a valid exercise of the State's far-ranging police power which is born out of public needs (*Nebbia* v.

New York, 291 U. S. 502, 525 *et seq.*). Those items are regulated as to price because they are among the "great public needs" referred to in *People* v. *Nebbia* (262 N. Y. 259, 270). But even the police power is limitable and the courts have the same duty to nullify unconstitutional legislative acts as to uphold statutes which satisfy or tend to satisfy or may reasonably be expected to satisfy some health, safety or welfare need. If no such relevance is discoverable, a statute infringing on the constitutionally protected rights of private property in price-fixing or similar restraints must fall (*Defiance Milk Prods. Co.* v. *Du Mond*, 309 N. Y. 537; *Trio Distr. Corp.* v. *City of Albany*, 2 N Y 2d 690; *Loblaw, Inc.* v. *New York State Bd. of Pharmacy*, 11 N Y 2d 102). In each of those three cases we held a statute violative of due process because it needlessly and arbitrarily forbade an otherwise valid business practice.

No one will question the traditional rights of the States (taken away by the Eighteenth Amendment but restored by the Twenty-first) under their inherent police power to prohibit, restrain or regulate the manufacture, sale and use of intoxicants (*Matter of Trustees of Calvary Presbyt. Church* v. *State Liq. Auth.*, 245 App. Div. 176, 178, affd. 270 N. Y. 497; *Mahoney* v. *Triner*, 304 U. S. 401). The New York Legislature has power to enact a variety of laws calculated to suppress intemperance or to minimize the known evils of the liquor traffic, since the trade is one as to which there is a recognized public interest. But "police power" is not a magic incantation to frighten off judicial investigation into the constitutionality of statutes. The State of New York could completely outlaw the sale of liquor but, having chosen instead to regulate it, the restrictions and requirements can be such only as are necessary to protect public safety, health and morals from the evils, known or apprehended, of the trade. The State's licensees may be subjected to the strictest supervision and control (as scores of appellate court decisions in this State attest) but such supervision and control must at least tend to preserve public order and discourage the intemperate use of alcohol. No

one has yet told us how any of these lawful purposes could be accomplished or furthered by forcing liquor prices down to the bottom level found anywhere in the United States. To promote temperance by making intoxicants cheaper is like [fol. 358] trying to minimize the dangers of excessive smoking by abolishing cigarette taxes.

This statute cannot be saved by recourse to the familiar aphorisms about presuming a statute's constitutionality or presuming that investigation has shown necessity, or avoiding the substitution of a court's judgment for a Legislature's, or the like. Those who attack a price-fixing law have the burden of showing its unconstitutionality beyond any reasonable doubt (*Lincoln Bldg. Assoc.* v. *Barr*, 1 N Y 2d 413) but that burden is met when the attackers show as they do here that the only reason suggested or available for its enactment—that is, eliminating "price discrimination" against our State's residents has no relationship to any public need or evil of the kind which justifies use of the police power (*Defiance Milk Prods. Co.* v. *Du Mond*, 309 N. Y. 537, 540-541, *supra*). Indeed, in section 8 of those 1964 amendments to section 101-b of the Alcoholic Beverage Control Law, the Legislature has forthrightly told us that its purpose and interest was solely to reduce the prices charged for brand-name liquor in this State. That was a long retreat from the old announced policy (see old § 101-c as enacted in 1950) of promoting temperance by eliminating price wars, by prohibiting sales below announced minima and by mandating resale price maintenance. It is a *non sequitur* that, since artificially jacking up the prices under earlier statutes did not promote temperance, forcing them down to the lowest levels in the whole country will be a step toward moderation in use.

It is suggested that we should respect and accept the judgment of the Legislature and the Governor that price limitation will further temperance. But the assumption that such was the purpose runs against the declared fact. Neither the Governor nor the Legislature ever offered such

a vain argument, and we must remember that sections 7 and 9 were not among the recommendations of the distinguished Moreland Act Commissioners appointed by the Governor. Temperance is a laudable objective and a proper State purpose but no one has the temerity to assert that cut-price liquor cuts down drinking. Therefore, it follows of absolute necessity that these amendments have nothing to do with the State policy written into section 2 of the State Alcoholic Beverage Control Law right after repeal of National Prohibition: "to regulate and control the manufacture, sale and distribution within the state of alcoholic beverages for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to law."

Even if these statutes could survive Federal constitutionality tests they are void for arbitrariness under our own decisions such as *Defiance Milk Prods. Co.* v. *Du Mond* (309 N. Y. 537, *supra*); *Trio Distr. Corp.* v. *City of Albany* (2 N Y 2d 690, *supra*); *Grove Hill Realty Co.* v. *Ferncliff* [fol. 359] *Cemetery Assn.* (7 N Y 2d 403, 410), and *Loblaw, Inc.* v. *New York State Bd. of Pharmacy* (11 N Y 2d 102, *supra*). Police power statutes under the New York State Constitution are valid only if the legislation is addressed to a legitimate end and, also, if the measures taken are reasonable and appropriate to that end (*Matter of People* [*Tit. & Mtge. Guar. Co.*], 264 N. Y. 69, 83)—that is, such a statute must be "reasonably related and applied to some actual and manifest evil". (*Defiance Milk Prods. Co.* v. *Du Mond, supra,* p. 541; *Twentieth Century Assoc.* v. *Waldman,* 294 N. Y. 571, 580, app. dsmd. 326 U. S. 697; *East N. Y. Sav. Bank* v. *Hahn,* 293 N. Y. 622, 627, affd. 326 U. S. 230; *Matter of Department of Bldgs. of City of N. Y.* [*Philco Realty Corp.*], 14 N Y 2d 291, 297). The only "evil" against which this legislation is directed is found, apparently, in the fact that some people somewhere in this country under other unknown and uninvestigated conditions buy liquor more cheaply than we do. If this be good law, similar statutes may be passed as to any sale-licensed commodity.

I do not, although I do not discuss them at length, overlook a number of other troublesome aspects of these amendments. These difficulties may be summed up by the statement that it is wholly arbitrary to force New York State liquor prices down to the lowest level prevailing anywhere in America, despite higher license fees charged in this State, despite higher wages and salaries here (and conversely a small volume of sales by some of the distributors-plaintiffs), despite the fact that abnormally low prices somewhere in the country may be due to temporary conditions totally unrelated to New York State prices, and despite the predictable and remarkable result that the distillers now may (or must) raise prices elsewhere in order to reap even a better harvest in the enormous New York State market.

The judgment should be reversed and judgment directed for plaintiffs as demanded in the complaint, with costs in all courts.

Judges Dye, Van Voorhis and Scileppi concur with Judge Bergan; Chief Judge Desmond dissents and votes to reverse in an opinion in which Judges Fuld and Burke concur.

Order affirmed.

[fol. 360] Triple Certificate to Foregoing Paper (omitted in printing).

[fol. 361]

IN THE COURT OF APPEALS FOR THE STATE OF NEW YORK

State of New York, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 9th day of July in the year of our Lord one thousand nine hundred and sixty-five, before the Judges of said Court.

Witness, The Hon. Charles S. Desmond, Chief Judge, Presiding.

Raymond J. Cannon, Clerk.

REMITTITUR—July 9, 1965

[fol. 362]

3. No. 249 65

JOSEPH E. SEAGRAM & SONS, INC., & ors., Appellants,

vs.

DONALD S. HOSTETTER, Chairman, & ors., constituting the State Liquor Authority, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York, Respondents.

Be it Remembered, That on the 27th day of May in the year of our Lord one thousand nine hundred and sixty-five, Joseph E. Seagram & Sons, Inc., & ors., the appellants in this cause, came here unto the Court of Appeals, by Lord, Day & Lord, their attorneys, and filed in the said Court a return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And Donald S. Hostetter, Chairman, & ors., constituting the State Liquor Authority, and Louis J. Lefkowitz, Attorney General of the State of New York, the respondents in said cause, afterwards appeared in said Court of Appeals by Louis J. Lefkowitz, Attorney General, who also appeared pro se.

Which said return thereto, filed as aforesaid, are hereunto annexed.

[fol. 363] Whereupon, The said Court of Appeals having heard this cause argued by Mr. Thomas F. Daly, of counsel for the appellants, and by Ruth Kessler Toch, of counsel for the respondents, brief filed by amici curiae, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

[fol. 364] Therefore, it is considered that the said order be affirmed, with costs, as aforesaid.

And hereupon, as well the return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

Raymond J. Cannon, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office, Albany, July 9, 1965.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals with the papers originally filed therein, attached thereto.

(Seal)

Raymond J. Cannon, Clerk.

[fol. 365]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

At a Special Term of the Supreme Court held in and for the County of Albany, at the County Court House in the City of Albany, New York, on the 16th day of July, 1965.

Present: Hon. Ellis J. Staley, Jr., Justice.

JOSEPH E. SEAGRAM & SONS INC., THE HOUSE OF SEAGRAM, INC., STITZEL-WELLER DISTILLERY, INC., THE PADDINGTON CORPORATION, HIRAM WALKER INCORPORATED, GOODERHAM & WORTS LIMITED, JAS. BARCLAY & CO., LIMITED, W. A. TAYLOR & COMPANY, HIRAM WALKER DISTRIBUTORS, INC., THE AMERICAN DISTILLING COMPANY, McCORMICK DISTILLING COMPANY, THE FLEISCHMANN DISTILLING CORPORATION, MR. BOSTON DISTILLER INC., THE VIKING DISTILLERY, INC., JAMES B. BEAM DISTILLING COMPANY, JAMES B. BEAM IMPORT CORPORATION, SCHENLEY INDUSTRIES, INC., AFFILIATED DISTILLERS BRANDS CORP., KNICKERBOCKER LIQUORS CORP., BARTON DISTILLING COMPANY, BARTON DISTILLERS IMPORT CORPORATION, JULIUS WILE SONS & COMPANY, INC., BACARDI IMPORTS, INC., AUSTIN NICHOLS & COMPANY, INC., CANADA DRY CORPORATION, HEUBLEIN INC., McKESSON & ROBBINS, INC., NATIONAL DISTILLERS AND CHEMICAL CORPORATION, PUBLICKER DISTILLERS PRODUCTS, INC., WAYNE LIQUOR CORP., BROWN FORMAN DISTILLERS CORPORATION, GLENMORE DISTILLERIES COMPANY, A. SMITH BOWMAN DISTILLERY INC., "21" BRANDS, INC., STAR HILL DISTILLING COMPANY, SCHIEFFELIN & COMPANY, ALPINE WINE & LIQUOR CORP., BEN PERLOW LIQUOR CORP., BISON LIQUOR CO., INC., BLUE CREST WINE AND SPIRIT CORP., BONNY DISTRIBUTING CO., INC., CAPITAL DISTRIBUTORS CORP., CARDINAL DISTRIBUTORS INC., COLONY LIQUOR DISTRIBUTORS, INC., DISTILLED BRANDS, INC., EBER BROS. WINE & LIQUOR CORP., ELMIRA

TOBACCO CO., INC., EMPIRE LIQUOR CORP., GRAVES & RODGERS, INC., M. LICHTMAN & CO., INC., MAJOR LIQUOR DISTRIBUTORS, INC., MONARCH LIQUOR CORP., MULLEN & GUNN, INC., PEERLESS IMPORTERS CORP., RAMAPO WINE & LIQUOR CORPORATION, ROCHESTER LIQUOR CORPORATION, RODGERS LIQUOR CO., INC., S & K WINE & LIQUOR CORP., STANDARD FOOD PRODUCTS CORP., STANDARD WINE & LIQUOR CO., INC., STAR INDUSTRIES INC., UNIVERSAL LIQUOR CORP., Plaintiffs,

—against—

DONALD S. HOSTETTER, Chairman, JOHN C. HART, WILLIAM H. MORGAN, BENJAMIN H. BALCOM, ROBERT E. DOYLE, constituting the State Liquor Authority, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York, Defendants.

ORDER ON REMITTITUR

Plaintiffs above named having appealed to the Court of Appeals from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department, entered on May 14, 1965 in the office of the Clerk of the [fol. 366] Appellate Division, which order affirmed with costs the order and judgment of the Supreme Court, entered in the office of the Clerk of Albany County on April 21, 1965, in favor of defendants, declaring § 9 and § 7, subdivision 3 (a), of Chapter 531 of the Laws of 1964 to be in all respects constitutional and valid, and denying plaintiffs' motion for a preliminary injunction; and said appeal having been argued in the Court of Appeals by Thomas F. Daly, Esq., of Counsel for Appellants, and Ruth Kessler Toch, Assistant Solicitor General, of Counsel for the Respondents, and after due deliberation had thereon the Court of Appeals having made its decision and having ordered and adjudged that the order of the Appellate Division of the Supreme Court herein be and the same hereby is affirmed with costs, and having further ordered that the records

aforesaid and the proceedings in the Court of Appeals be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law,

Now, on reading and filing the remittitur from the Court of Appeals herein, dated July 9, 1965, and upon motion of Louis J. Lefkowitz, Attorney General of the State of New York, attorney for defendants herein, it is

Ordered, that the said order and judgment of the Court of Appeals be and it is hereby made the order and judgment of this Court; and it is further

Ordered, that the Clerk of the County of Albany enter judgment against the plaintiffs for said costs to be taxed.

Enter

Ellis J. Staley, Jr., Justice of the Supreme Court.

Office of Albany, County Clerk, Jul 19 10 01 AM '65, Albany, N. Y.

[fol. 367]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

County Clerk's Index No. 6127/64

JOSEPH E. SEAGRAM & SONS INC., THE HOUSE OF SEAGRAM, INC., STITZEL-WELLER DISTILLERY, INC., THE PADDINGTON CORPORATION, HIRAM WALKER INCORPORATED, GOODERHAM & WORTS LIMITED, JAS. BARCLAY & CO., LIMITED, W. A. TAYLOR & COMPANY, HIRAM WALKER DISTRIBUTORS, INC., THE AMERICAN DISTILLING COMPANY, MCCORMICK DISTILLING COMPANY, THE FLEISCHMANN DISTILLING CORPORATION, MR. BOSTON DISTILLER INC., THE VIKING DISTILLERY, INC., JAMES B. BEAM DISTILLING COMPANY, JAMES B. BEAM IMPORT CORPORATION, SCHENLEY INDUSTRIES, INC., AFFILIATED DISTILLERS BRANDS CORP., KNICKERBOCKER LIQUORS CORP., BARTON DISTILLING COMPANY,

BARTON DISTILLERS IMPORT CORPORATION, JULIUS WILE SONS & COMPANY, INC., BACARDI IMPORTS, INC., AUSTIN NICHOLS & COMPANY, INC., CANADA DRY CORPORATION, HEUBLEIN INC., MCKESSON & ROBBINS, INC., NATIONAL DISTILLERS AND CHEMICAL CORPORATION, PUBLICKER DISTILLERS PRODUCTS, INC., WAYNE LIQUOR CORP., BROWN FORMAN DISTILLERS CORPORATION, GLENMORE DISTILLERIES COMPANY, A. SMITH BOWMAN DISTILLERY INC., "21" BRANDS, INC., STAR HILL DISTILLING COMPANY, SCHIEFFELIN & COMPANY, ALPINE WINE & LIQUOR CORP., BEN PERLOW LIQUOR CORP., BISON LIQUOR CO., INC., BLUE CREST WINE AND SPIRIT CORP., BONNY DISTRIBUTING CO., INC., CAPITAL DISTRIBUTORS CORP., CARDINAL DISTRIBUTORS INC., COLONY LIQUOR DISTRIBUTORS, INC., DISTILLED BRANDS, INC., EBER BROS. WINE & LIQUOR CORP., ELMIRA TOBACCO CO., INC., EMPIRE LIQUOR CORP., GRAVES & RODGERS, INC., M. LICHTMAN & CO., INC., MAJOR LIQUOR DISTRIBUTORS, INC., MONARCH LIQUOR CORP., MULLEN & GUNN, INC., PEERLESS IMPORTERS CORP., RAMAPO WINE & LIQUOR CORPORATION, ROCHESTER LIQUOR CORPORATION, RODGERS LIQUOR CO., INC., S & K WINE & LIQUOR CORP., STANDARD FOOD PRODUCTS CORP., STANDARD WINE & LIQUOR CO., INC., STAR INDUSTRIES INC., UNIVERSAL LIQUOR CORP., Plaintiffs-Appellants,

—against—

DONALD S. HOSTETTER, Chairman, JOHN C. HART, WILLIAM H. MORGAN, BENJAMIN H. BALCOM, ROBERT E. DOYLE, constituting the State Liquor Authority, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York, Defendants-Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed July 23, 1965

I. Notice is hereby given that Joseph E. Seagram & [fol. 368] Sons, Inc., et al., the plaintiffs-appellants above-named, hereby appeal to the Supreme Court of the United

States from the order of affirmance of the State of New York Court of Appeals entered in this action on July 9, 1965, affirming an order of the Appellate Division of the Supreme Court, Third Judicial Department, entered May 14, 1965, which affirmed an order of the Supreme Court, Albany County, entered April 21, 1965, denying plaintiffs-appellants' motion for temporary injunction and granting defendants-appellees' cross-motion for declaratory judgment.

This appeal is taken pursuant to 28 U.S.C.A. § 1257(2).

II. The Clerk will please prepare a certified copy of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said certified copy the following:

Remittitur of the Court of Appeals, State of New York, including the record on appeal to said Court of Appeals and the order of affirmance by said Court of Appeals dated July 9, 1965.

Order on Remittitur of the Supreme Court of the State of New York, Albany County, entered July 19, 1965.

III. The following questions are presented by this appeal.

1. Does the Twenty-first Amendment to the Constitution of the United States permit the New York State Legislature to enact laws violative of other federal constitutional guarantees?

[fol. 369] 2. Does Section 9 of Ch. 531 of the New York Session Laws, 1964, violate Article VI of the Constitution of the United States?

3. Does Section 9 of Ch. 531 of the New York Session Laws, 1964, violate Article I, Section 8 of the Constitution of the United States?

4. Does Section 9 of Ch. 531 of the New York Session Laws, 1964, violate the due process clause of the Fifth and Fourteenth Amendments of the Constitution of the United States?

5. Does Section 9 of Ch. 531 of the New York Session Laws, 1964, violate the equal protection clause of the Fifth and Fourteenth Amendments of the Constitution of the United States?

6. Do certain parts of Section 7 of Ch. 531 also violate these constitutional guarantees?

Dated: New York, N. Y.
July 23, 1965

Lord, Day & Lord, Attorneys for Plaintiffs-Appellants, Joseph E. Seagram & Sons, Inc., et al., Office & P. O. Address, 25 Broadway, New York, N. Y. 10004.

To:

Louis J. Lefkowitz, Esq., Attorney General of the State of New York, Attorney for Defendants-Appellees.

County Clerk of Albany County, Albany, New York.

[fol. 370] Proof of Service (omitted in printing).

[fol. 371]

SUPREME COURT OF THE UNITED STATES

No. 545, October Term, 1965

JOSEPH E. SEAGRAM & SONS, INC., et al., Appellants,

v.

DONALD S. HOSTETTER, ETC., et al.

ORDER NOTING PROBABLE JURISDICTION—November 22, 1965

Appeal from the Court of Appeals of the State of New York.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.